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7

8 UNITED STATES BANKRUPTCY COURT
9 EASTERN DISTRICT OF CALIFORNIA
10 (Sacramento Division)

11 IN RE:

12 JAMES H. TIRK,

Debtor

14 JAMES H. TIRK,

Movant,

15 Vs.

16 MARIN COUNTY DISTRICT ATTORNEY,
17 Respondent

Case No.: 03-20759-B-7

DCN AMH-1

OPPOSITION TO DEBTOR'S MOTION
TO AVOID LIEN

DATE: June 3, 2003

TIME: 9:00 am

CTRM: 33, 6th Floor

18 The Department of Child Support Services ("DCSS")¹ erroneously
19 sued as the District Attorney's Office for the County of Marin
20 files their Opposition to Debtor's Motion to Avoid Judicial Lien.

21 The DCSS is the assignee of a child support judgment creditor
22 pursuant to § 408(a)(3) of the Social Security Act.
23

24
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26 _____
27 ¹ The Department of Child Support Services ("DCSS") is the successor in interest for child support services for Marin
28 County effective 7-1-2002. All activities alleged to have occurred before July 1, 2002 would have been handled by the
District Attorney. For all actions, on or after July 1, 2002, the correct Defendant would be the Department of Child
Support Services.

PRELIMINARY STATEMENT

1
2 The Marin County Department of Child Support Services
3 (erroneously sued as the District Attorney) is a child support
4 agency. A Child Support Agency in a Bankruptcy proceeding, appears
5 pursuant to Pub.L 103-394, Title IV, § 304(g), 108 Stat. 4134,
6 which states:

7 "Child Support creditors or their representatives shall
8 be permitted to appear and intervene without charge, and
9 without meeting any special local court rule requirement
10 for attorney appearances, in any bankruptcy case or
11 proceeding in any bankruptcy court or district court of
12 the United States if such creditors or representatives
13 file a form in such court that contains information
14 detailing the child support debt, its status, and other
15 characteristics."

16 The Department of Child Support Services is the successor in
17 interest to the Marin County District Attorney (hereinafter
18 referred to as the "DCSS"). The Department of Child Support
19 Services became an entity separate from the District Attorney on
20 July 1, 2002.

21 The new agency maintains the same rights and responsibilities
22 as those previously assigned to the District Attorney. The DCSS is
23 a governmental entity and an arm of the State of California.
24 California Family Code §§ 17303 *et seq.* and §§ 17400 *et seq.* The
25 correct party for this action is the DCSS.

Brief Factual Background

26 James H. Tirk is the debtor. Tirk owes child support based
27 upon a Judgment of Dissolution of Marriage filed May 3, 1973
28 (attached to the proof of claim filed 2-10-2003). Child support
was ordered to be paid at a rate of \$50.00 per month per child for

1 a total of \$200.00 per month.

2 On or about 10-30-2001, Tirk sold his previous residence at
3 4428 Greenholme Dr., #2, Sacramento. The DCSS had a lien on this
4 property for the amount of the unpaid child support which had
5 accrued under the child support order. Tirk indicated that all
6 proceeds from the sale of the Greenholme residence would be used to
7 fund the downpayment of his new residence at 4137 Gothberg Ave,
8 North Highlands (his claimed homestead with the alleged impaired
9 lien). DCSS released the child support lien to allow the sale and
10 purchase to proceed. The next month, Tirk bought the Gothberg
11 property and DCSS recorded another child support lien. Tirk filed
12 this Chapter 7 and seeks to avoid the lien for child support. Tirk
13 owes over \$80,000 in child support arrears.
14
15

16 **Legal Analysis**

17 **1. Child Support is exempt from Discharge**

18 Child Support debt is exempt from discharge pursuant to 11
19 U.S.C. § 523 (a)(5) which states:
20

21 "a) A discharge under section 727, 1141, 1228(a), 1228(b), or
22 1328(b) of this title does not discharge an individual debtor from
any debt -

23 (5) to a spouse, former spouse, or child of the debtor, for
24 alimony to, maintenance for, or support of such spouse or child,
25 in connection with a separation agreement, divorce decree or
other order of a court of record, determination made in
accordance with State or territorial law by a governmental unit,
or property settlement agreement, but not to the extent that -

26 (A) such debt is assigned to another entity, voluntarily, by
27 operation of law, or otherwise (other than debts assigned
pursuant to section 408(a)(3) of the Social Security Act, or
any such debt which has been assigned to the Federal Government
or to a State or any political subdivision of such State)..."
28

1 "[T]he debts are in the nature of child support, and fall
2 within the exception to discharge in § 523(a) and the exception to
3 lien avoidance in § 522(f)(1)(A). Therefore, these debts are not
4 dischargeable under § 523(a)(5), and Tenney's and Peck's liens
5 cannot be avoided under § 522(f)(1)(A). *In re Ramirez* 2000 WestLaw
6 356314 (Bkrtcy N.D.Ill. 2000); *In re Slater* 188 B.R. 852, 857
7 (Bkrtcy E.D. Wash. 1995).
8

9 **2. Child Support is exempt from lien avoidance.**

10 Child Support debt is exempt from judicial lien avoidance.

11 11 U.S.C. § 522(f)(1) states:

12 "(f)(1) Notwithstanding any waiver of exemptions but subject to
13 paragraph (3), the debtor may avoid the fixing of a lien on an
14 interest of the debtor in property to the extent that such lien
15 impairs an exemption to which the debtor would have been entitled
16 under subsection (b) of this section, if such lien is -

17 (A) a judicial lien, other than a judicial lien that secures a
18 debt -

19 (i) to a spouse, former spouse, or child of the debtor, for
20 alimony to, maintenance for, or support of such spouse or
21 child, in connection with a separation agreement, divorce
22 decree or other order of a court of record, determination made
23 in accordance with State or territorial law by a governmental
24 unit, or property settlement agreement; and

25 (ii) to the extent that such debt -

26 (I) is not assigned to another entity, voluntarily, by
27 operation of law, or otherwise; and

28 (II) includes a liability designated as alimony,
maintenance, or support, unless such liability is actually in
the nature of alimony, maintenance or support."

Debtor is attempting to avoid a child support lien claiming
that it impairs his exemption.

3. Child Support creditors can reach exempt assets

1 Exempt assets are reachable by child support creditors. 11
2 U.S.C. § 522(c)(1) allows child support creditors to attach exempt
3 assets.

4 **4. The lien does not impair an exemption and the child support lien**
5 **is not avoidable.**

6
7 Since exempt property remains liable for support debts under
8 11 U.S.C., §522(c)(1), it cannot be claimed that the debtor's lien
9 is impaired. "...Congress clearly intended the avoidance powers of
10 522(f) be used to avoid judicial liens on exempt property secured
11 by non-dischargeable debts NOT specifically protected by section
12 522(c)." *In re Slater* (Bkrtcy.W.D.Wash. 1995) 188 B.R. 852 at 857.

13
14 In addition, since the debt is nondischargeable and
15 enforceable after discharge, there is nothing to prevent the lien
16 from reattaching post-discharge. In the event that DCSS attempts
17 to execute on the lien, debtor may assert his homestead exemption
18 and DCSS' lien will only be satisfied once debtor's exempt amount
19 has been met.

20 **5. The lien is not an avoidable judicial lien**

21 A lien must be judicial in nature to be eligible for
22 avoidance under 11 U.S.C. §522(f)(1)(A) and not for child support.
23 If the lien is in the nature of child support, it may not be
24 avoided. The fact that the debt secured by the lien arose in a
25 judicial proceeding does not make the lien an avoidable judicial
26 lien. *In re Ramirez*, 2000 WestLaw 356314 (Bkrtcy.N.D.Ill 2000). Nor
27
28

1 does the fact that a judicial proceeding is necessary to enforce a
2 lien convert a statutory lien into a judicial lien, *In re Reece*,
3 274 B.R. 515, 519 (Bkrtcy.D.Ariz. 2001); *In re Wiltcher*, 204 B.R.
4 488 (Bkrtcy.S.D.Miss. 1996); *In re Koski*, 149 B.R. 170
5 (Bkrtcy.D.Idaho 1992); *In re Stern*, 44 B.R. 15, 18 (Bkrtcy.D.Mass.
6 1984). See also, *In re Chu*, 258 B.R. 205 (Bkrtcy.N.D.Cal. 2001).

8 As the court noted in *Reece*, *supra*, at pp. 518-519, a
9 document may be filed in advance of an enforcement action

10 "and is filed for the purposes of perfection only. When a
11 subsequent event occurs such as . . . (e.g. the
12 nonpayment of support), the essential nature of . . .
13 (the) lien is not somehow recharacterized from statutory
14 to judicial. . . . As to the reference that a statutory
15 lien is a lien which arises upon 'specified circumstances
16 or conditions,' as set forth in 11 U.S.C. § 101(53), this
17 language is satisfied upon the original filing of . . .
18 (the document) which gives . . . (the lien holder) the
19 right to claim a lien on any unpaid assessments."

20 Analogous to *Reece*, California law provides that a lien
21 attaches to real property of the debtor in the county where an
22 abstract or certified copy of the judgment is recorded *to the*
23 *extent support has become due and is not paid.* Cal. Code of Civ.
24 Proc. §697.350(c). The simple recording of an abstract does not
25 place a lien on the debtor's real property. It is the nonpayment
26 of support which causes the lien. Thus, the lien in no way arises
27 from or requires judicial action; it is strictly of statutory
28 origin. A lien is statutory when "[t]here is no legal or
equitable process or proceeding necessary to determine whether or
not . . . (a lien claimant) is entitled to this lien before it

1 attaches," *In re Ranes*, 31 B.R. 70, 72 (Bkrctcy.D.Colo. 1983).

2 See also, *In re Washington*, 242 F.3d 1320, 1323-24 (11th
3 Cir. 2001), holding that liens not 'obtained by judgment' do not
4 meet the required definition of a judicial lien under section
5 101(36). This case strongly suggests that some judicial action,
6 relative to the lien itself, is necessary for the lien to be
7 considered a "judicial lien."
8

9 In a similar case, the bankruptcy court, in construing the
10 State of New Mexico support lien law, held that the lien was
11 statutory when "[t]he effect of recording a decree awarding support
12 or maintenance of a child is to 'become a lien on the real estate
13 of the party which must furnish the child support from the date of
14 filing'." *In re Lekvold*, 18 B.R. 663, 665 (Bkrctcy.D.N.M. 1982).
15 The California and New Mexico statutes are quite similar. In both
16 cases no judicial intervention is required to impose a lien on the
17 debtor's real estate. The lien arises automatically under the
18 statute from the debtor's failure to comply with a court ordered
19 support obligations.
20
21

22 **6. The DCSS is entitled to 11th Amendment Immunity**

23 While Bankruptcy Law allows for the filing of an action to
24 avoid a lien as a motion, it is in essence an adversary proceeding.
25 As such, the Department of Child Support Services, an arm of the
26 State of California, is entitled to 11th Amendment Immunity.
27

28 The Eleventh Amendment provides that "[t]he Judicial

1 power of the United States shall not be construed to extend to any
2 suit in law or equity, commenced or prosecuted against one of the
3 United States by Citizens of another State, or by Citizens or
4 Subjects of any Foreign State." It is "an explicit limitation of
5 the judicial power of the United States," *Missouri v. Fiske* (1933)
6 290 U.S. 18, 25, and when properly invoked, deprives federal courts
7 of jurisdiction to hear suits against the states, see *Pennhurst*
8 *State School & Hosp. v. Halderman* (1984) 465 U.S. 89, 119-120.

9 It is firmly established that the immunity provided by the 11th
10 Amendment prohibits the prosecution of suits filed in a federal
11 forum by a state's own citizens. See, e.g., *Puerto Rico Aqueduct &*
12 *Sewer Authority v. Metcalf & Eddy, Inc.* (1993) 506 U.S. 139, 144;
13 *Harter v. Vernon* (4th Cir. 1996) 101 F.3d 334, 337. The Supreme
14 Court of the United States has explained:

15 [T]he entire judicial power granted by the Constitution does not embrace authority to
16 entertain a suit brought by private parties against a state without consent given: not
17 one brought by citizens of another State . . . because of the Eleventh Amendment; and
18 not even one brought by its own citizens, because of the fundamental rule of which
19 the Amendment is but an exemplification.
20 *Ex Parte New York* (1921) 256 U.S. 490, 497; accord *Seminole Tribe*
21 *of Florida v. Florida* (1996) 517 U.S. 44.

22 Furthermore, the Supreme Court has recognized that the
23 Eleventh Amendment applies not only to the states, but also to
24 state agencies acting as "arms" of the state. *Florida Dep't of*
25 *State v. Treasure Salvors, Inc.* (1982) 458 U.S. 670, 684; see also
26 *Mt. Healthy City Board of Ed. V. Doyle* (1977) 429 U.S. 274, 280;
27 *Ram Ditta v. Maryland Nat'l Capital Park & Planning Comm'n* (4th Cir.
28 1987) 822 F.2d 456, 457. The Department of Child Support Services
is an agency under the authority of the State of California

1 Department of Child Support Services. California Family Code §
2 17300 et seq. The DCSS is, therefore, entitled to 11th amendment
3 immunity.

4 The most salient inquiry when determining whether an agency is
5 an arm of the state is whether a judgment against it will be
6 satisfied by the state's treasury. See, e.g., *Hess v. Port Auth.*
7 *Trans-Hudson Corp.* (1994) 513 U.S. 30.

8 The salaries, expenses, and other allowances of the DCSS are
9 paid out of the public fiske. The DCSS is, therefore, entitled to
10 Eleventh Amendment protection. See, e.g., *Edelman v. Jordan* (1974)
11 415 U.S. 651 (Department of Public Aid of Illinois immune). The
12 salaries, expenses and other allowances of the DCSS are paid by the
13 State of California through a direct grant to the local government.

14 This said, the immunity is not absolute, see *Thorpe v.*
15 *Virginia State Univ.* (E.D. Va. 1998) 6 F.Supp.2d 507, 510, and as
16 interpreted in this circuit, is not implicated by all federal
17 proceedings, see *NVR Homes, Inc. v. Clerks of the Circuit Courts*
18 *for Anne Arundel County, Maryland (In re NVR, LP)* (4th Cir. 1999)
19 189 F.3d 442, 450. While the United States Supreme Court has ruled
20 that a state may waive its immunity, and consent to federal
21 jurisdiction, *Atascadero State Hosp. v. Scanlon* (1985) 473 U.S.
22 234, 238, the holding in that case has been overruled by Congress'
23 enactment of 42 U.S.C. § 2000d-7 in 1986 specifically excluding 11th
24 Amendment immunity from title IX and title VI actions.. Congress
25 may abrogate sovereign immunity if it has "unequivocally
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1 expresse[d] its intent" to do so and has acted "pursuant to a valid
2 exercise of power," *Green v. Mansour* (1985) 474 U.S. 64, 68.
3 Furthermore, in *Ex parte Young* (1908) 209 U.S. 123, the Supreme
4 Court carved out a narrow exception to immunity that allows suits
5 for injunctive or declaratory relief to proceed against *individual*
6 state officials to remedy ongoing violations of federal law. See
7 *South Carolina State Ports Authority v. Federal Maritime Comm'n* (4th
8 Cir. 2001) 243 F.3d 165, 170, *aff'd* (2002) 122 S. Ct. 1864.

10 1. Debtor's Motion to Avoid a lien Is a Suit.

11 While the Supreme Court's "recognition of sovereign immunity
12 has not been limited to the suits described in the text of the
13 Eleventh Amendment," *Idaho v. Coeur d'Alene Tribe of Idaho* (1997)
14 521 U.S. 261, 267 (1997), the Fourth Circuit has held that not all
15 bankruptcy proceedings implicate the amendment's proscription, see,
16 *e.g.*, *Virginia v. Collins (In re Collins)* (4th Cir. 1999) 173 F.3d
17 924, 929. Thus, in this circuit, neither a motion to reopen a
18 Chapter 7 bankruptcy, see *id.*, nor a proceeding to adopt a Chapter
19 11 plan of reorganization is a "suit" of the sort proscribed by
20 sovereign immunity, see *Maryland v. Antonelli Creditor's*
21 *Liquidating Trust* (4th Cir. 1997) 123 F.3d 777, 786-87.

22 This distinguished from the case in which a debtor, a trustee
23 or other private person files an adversary action (or an action
24 which pursuant to local rules may proceed by motion, such as a
25 Motion to Avoid a Judicial Lien) against the state in the
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1 bankruptcy court, causing the bankruptcy court to issue process
2 summoning the state to appear. Such Motion or proceeding would be
3 a suit "prosecuted against one of the United States" and
4 adjudication of that suit would depend on the court's jurisdiction
5 over the state, implicating the Eleventh Amendment's limitation on
6 federal judicial power." *Id.*

8 Debtor has filed a motion to avoid a lien proceeding against
9 an arm of the State of California, causing this Court to issue
10 process summoning it to appear. If the DCSS failed to timely
11 respond to the Motion, it would be faced with judgment by default
12 and the lien being avoided. Moreover, to grant the relief that
13 Debtor seeks, this Court would affect the State Treasury of
14 California and the County treasury of the County of Marin and the
15 DCSS. There is no doubt then that this Motion is a suit
16 "prosecuted against one of the United States" that, absent
17 abrogation or exception, is barred by sovereign immunity.

18 Therefore, debtor's claims that the lien is avoidable, brought
19 under the Bankruptcy Code are barred. *See Schlossberg v. Maryland*
20 *(In re Creative Goldsmiths of Washington, D.C., Inc.)* (4th Cir.
21 1997) 119 F.3d 1140, 1147, or 42 U.S.C. § 1983, *see Will v.*
22 *Michigan Dep't of State Police*, (1989) 491 U.S. 58, 63.

24 2. Congress Has Not Abrogated Eleventh Amendment Immunity in
25 Adversary Proceedings.

26 Although Congress purported to abrogate the states' Eleventh
27 Amendment immunity in adversary proceedings by enacting 11 U.S.C. §
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1 106, it is firmly established in this circuit, *see, e.g., Collins,*
2 173 F.3d at 927-28, and in others, *see, e.g., Sacred Heart Hosp. of*
3 *Norristown v. Pennsylvania,* (3rd Cir. 1998) 133 F.3d 237, 245, that
4 this attempt at abrogation was "unconstitutional and ineffective."
5 *Schlossberg,* 119 F.3d at 1147. The Bankruptcy Clause of the
6 Constitution, art. I, § 8, cl. 4, does not vest Congress with the
7 authority to abrogate sovereign immunity. 119 F.3d at 1145-46.
8 Moreover, § 106 was not enacted pursuant to a lawful exercise of
9 Congress' enforcement power under § 5 of the Fourteenth Amendment,
10 119 F.3d at 1146-47. Thus, sovereign immunity bars this Court from
11 exercising jurisdiction over this nonconsenting Defendant, unless
12 debtor can avail himself of an exception to the Eleventh Amendment.
13
14

15 CONCLUSION

16 Debtor's claims that the child support lien impairs his
17 homestead exemption is not legally tenable as the lien is not
18 avoidable, it does not impair his exemption and the debt is non-
19 dischargeable and is barred by the 11th amendment. Accordingly,
20 Debtor's Motion should be denied.
21

22 WHEREFORE, the Department of Child Support Services
23 (erroneously sued as the District Attorney) of the County of Marin,
24 asks the Court to deny the Motion to Avoid Judicial Lien that
25 Impairs Debtor's Exemption.
26

27 DATED: May 7, 2003
28

1 DEPT. OF CHILD SUPPORT SERVICES
2 COUNTY OF MARIN
3 STATE OF CALIFORNIA
4 7655 Redwood Blvd.
5 Novato, CA 94945
6 (415) 507-4068
7 (415) 507-4150 fax
8 tritter@co.marin.ca.us

9 _____
10 TEX RITTER
11 Deputy Child Support Attorney
12 California Bar # 123072

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19 DECLARATION OF TEX RITTER IN SUPPORT OF OPPOSITION

20 I, Tex Ritter, do declare that:

21 1. I am an attorney for the Department of Child Support
22 Services ("DCSS") for the County of Marin. I have personal
23 knowledge of the matters set forth or I am the custodian of records
24 of files maintained in the regularly conducted business activities
25 of which I testify and if called upon to testify, would do so
26 competently.

27 2. I am familiar with DCSS' computer systems for the
28

1 recording of data and events processing with their cases regularly
2 conducted activities.

3 3. I am familiar with the DCSS business practices and a
4 custodian of records with respect to the regularly conducted
5 activities, including, but not limited to, the compilation of
6 computer records and the maintaining of a case file with respect to
7 the debtor, James Tirk.

8 4. The records I reviewed were made at or near the time of
9 the occurrence of the matter set forth in this declaration and the
10 records are kept in the normal course of business and are regularly
11 conducted activities of the DCSS and are made by the regularly
12 conducted activity in a regular practice.

13 5. The records of the DCSS are reviewed periodically to
14 ensure accuracy and there are sufficient security safeguards in
15 place to maintain the integrity of the data and to minimize the
16 ability of individuals to alter or compromise the data and
17 information.

18 6. The records are maintained as a regularly conducted
19 business activity.

20 7. The DCSS records indicate that, as of February 28, 2003,
21 Debtor, James Tirk owed \$84,880.81 in child support and accrued
22 interest from a Dissolution of Marriage Judgment filed 5-9-1973.

23 8. DCSS had filed an abstract of Judgment in Sacramento
24 County and on 10-18-2001, we received a request from a title
25 company requesting that we allow Tirk to apply the proceeds from
26 the sale of his residence on Greeneholme Dr so that he could
27 purchase property on Gothberg Ave.

28 9. The DCSS released their lien to allow the sale to proceed

1 and the sales proceeds to be transferred to the purchase of the
2 property on Gothberg Avenue.

3 10. In February 2002, the DCSS filed another abstract of
4 child support judgment and the lien attached to the Gothberg
5 property.

6 I declare under penalty of perjury under the laws of the State
7 of California that the foregoing is true and correct.

8 Executed this 7th day of May, 2003 at Novato, California
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12 Tex Ritter, Supervising Child Support Attorney
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