Wyoming Law Journal

Volume 11 | Number 2 Article 16

December 2019

Wage Exemption in Wyoming

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the distribution of his property, this probable construction is not consonant with reason and natural justice. It is to be seriously doubted that the intestate would have intended to favor the descendants of a particular son, brother or uncle, merely because that particular person happened to have fewer descendants than another in the same class. Such is the effect of this construction.

Remedial legislation would be desirable. The plan proposed by the Model Probate Code[22] in its provisions covering intestate succession would reach a more justifiable result. It provides in essence that the shares of others than the surviving spouse will be equal if all claimants are in equal degree of relationship to the intestate, while the distribution is per stirpes (by representation) if the claimants are in unequal degrees. The code explicitly states what is to be meant by representation:

> " 'Representation' refers to a method of determining distribution in which the takers are in unequal degrees of kinship with respect to the intestate, and is accomplished as follows: after first determining who are in the nearest degree of kinship of those entitled to share in the estate, the estate is divided into equal shares, the number of shares being the sum of the number of living persons who are in the nearest degree of kinship and the number in the same degree of kinship who died before the intestate, but who left issue surviving; each share of a deceased person in the nearest degree shall in turn be divided in the same manner among his surviving children and the issue of his children who have died leaving issue who survive the intestate; this division shall continue until each portion falls to a living person. All distributees except those in the nearest degree are said to take by representation."

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WAGE EXEMPTION IN WYOMING

Wyoming, through statutory enactment, has provided partial exemption of the judgment debtor's wages from garnishment.[1] The purpose, as expressed by the Wyoming Supreme Court, is to save debtors and their families from want by reason of misfortune or improvidence.[2] Yet, by the provisions of Wyoming's garnishment-in-aid-of-execution statutes,[3] this purpose may be defeated in many instances. Apparently, the debtor may be deprived of his entire wage without any opportunity for the assertion of his exemption. Garnishment-in-aid-of-execution in Wyoming requires only notice to the garnishee, with no requirement as to notice to the judg-

22. Problems in Probate Law Including a Model Probate Code, § 22 (1946).

1. Wyo. Comp. Stat. § 3-4713 (1945).
2. Lafferty v. Sistalla, 11 Wyo. 360, 72 Pac. 192 (1903).
3. Wyo. Comp. Stat. §§ 3-4801 through 4812; §§ 3-4705 through 4712 (1945); the problem is substantially the same in the Justice of Peace Courts, see Wyo. Comp. Stat. § 14-905 (1945).

ment debtor.[4] This procedure is possible as the proceedings are deemed ancilliary to the previous action, at which the judgment was rendered against the judgment debtor.[5] The constitutionality of this mode of garnishment, without notice to the judgment debtor, has been upheld by a vast majority of the courts, over objections alleging violation of due process.[6] After notice to the garnishee, his only duty is to answer, stating his indebtedness to the judgment debtor, and upon payment to the court of this indebtedness, the garnishee is relieved from further liability.[7] Thus, no duty is put upon the garnishee to look after the interests of the judgment debtor, although the debtor may be totally unaware of the garnishment proceedings. In the light of these statutory provisions, it would appear that the purpose of the exemption statute is completely frustrated when a case occurs in which the judgment debtor's wage, which is entitled to the exemption, is garnisheed without his notice. Without notice, he had no opportunity to assert his exemption and his employer, who might have known of the exemption right of his employee, had neither the duty to notify him nor any duty to assert the exemption in the debtor's behalf. This brings us to the problem of whether the judgment debtor in Wyoming, who finds himself in such a sorry state of affairs, has any available remedy, where the entire garnishment proceedings were instituted and conducted in exact accordance with the statutory provisions.

Many states, despite the same procedural provisions dealing with garnishment, as are found in Wyoming, have given relief to the judgment debtor who finds his wages garnisheed, without notice or without any effort made to assert his exemption right. This relief has been predicated on the failure of the garnishee to carry out certain implied duties, outside of those which might be found within the statutes. These decisions indicate that the courts will imply, either the duty to set up the exemption as a defense to the action or the duty to notify the debtor of the proceedings against him, or both. Upon failure to carry out these duties the garnishee would be subjected to liability to the judgment debtor for the amount of the exempt wages which were subjected in the garnishment. This liability has been imposed, despite statutory language to the effect that upon payment to the court, the garnishee would be relieved from further liability and the judgment would serve as a bar to any subsequent action by the debtor against the garnishee. Thus, the Texas court, under statutory provision similar to those in Wyoming,[8] held that satisfaction by a garnishee of a judgment rendered against him, was no bar to an action by the judgment debtor to recover exempt wages.[9] No notice was given the debtor and the garnishee, in compliance with the statute, merely ans-

4. Ibid.
5. Zimek v. Illinois National Casualty Co., 370 Ill. 572, 19 N.E. 620 (1939); Thacker v. Cook, 236 Ky. 159, 32 S.W.2d 738 (1930).
6. Ibid; contra, State Bank of Dodge City v. McKibbon, 146 Kan. 341, 70 P.2d 1 (1937).
7. Wyo. Comp. Stat. §§ 3-4802 and 3-4712 (1945).
8. Missouri Pacific Ry. Co. v. Whipsker, 77 Tex. 14, 13 S.W. 639 (1890); Johnson v. Hall, — Tex. App. ——, 163 S.W. 399 (1913).
9. See note 3 supra.

wered stating certain wages were due to the debtor, although knowing of the debtor's exemption. The court stated that although the statutes, literally construed, did not require the garnishee to answer further than whether he was indebted to the debtor, it was not intended that the garnishee would in his answer confine himself to the literal directions, when he knows the wage is exempt. The court felt such a rule would place it in the power of the garnishee to deprive the debtor of his exemption. It was suggested that after the garnishee disclosed the exemption in his answer, he should have the debtor cited into the action to the end that he could make his own defense. The Georgia court has ruled along these same lines holding that one who owes wages which are exempt from garnishment, upon being summoned, should set up the fact of the exemption in his answer; his failure to do so, accompanied by a judgment rendered against him, will subject him to liability in a suit by the debtor for the amount of the exemption.[10] A Federal Court of Appeals, has expressed the view, by way of dictum, that while in some jurisdictions, service of process on the garnishee is sufficient to authorize the court to proceed to judgment as to the debt garnisheed, it is the duty of this garnishee to give notice of the proceedings to the debtor.[11] The courts of Iowa, Illinois, Indiana and Mississippi have also found a duty to claim the exemption for the benefit of the debtor, when the debtor has no notice of the proceedings.[12] The U.S. Supreme Court, although dealing with a contest involving a foreign garnishment, stated, by way of dicta, that it was generally recognized that the failure of the garnishee to give proper notice to the debtor of the proceedings would be such a neglect of duty as would deprive him of availing himself of the judgment as a bar to a subsequent suit by the debtor.[13] The Court felt that this notification by the garnishee is for the purpose of making sure that the debtor shall have the opportunity to defend the claim made against him. A Maryland decision laid down the rule that the garnishee upon being summoned, is under the obligation to give notice to the principal defendant.[14] His failure will result in his loss of the protection which would normally be afforded by the garnishment judgment. In none of these decisions did the courts rely on statutory requirements to impose the duties to defend or notify the judgment debtor of the garnishment. The underlying factor, upon which these decisions are based, is the high regard the law has apparently shown for exemption statutes and protection of the rights of the judgment debtor.[15]

There has not been complete agreement among the courts as to the

10. Southern Ry. Co. v. Fulford, 125 Ga. 103, 53 S.E. 68 (1906); Watkins v. Cason, 46 Ga. 444, 166 A.L.R. 305 (1872).
11. Morris W. Haft & Bros., Inc. v. Wells, 93 F.2d 991 (10th Cir. 1937).
12. Smith v. Dickson, 58 Iowa 444, 10 N.W. 850 (1882); Markus, for use of Guditus v. Hart, Schaffner & Marx, 284 Ill. App. 166, 1 N.E.2d 699 (1936); Alberts et al. v. Baker, 21 Ind. App. 373, 52 N.E. 469 (1899); Laurel v. Turner, 80 Miss. 530, 31 So. 965 (1902).
13. Harris v. Balk, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023 (1905).
14. Cole v. Randall Park Holding Co., 201 Md.2d 616, 95 A.2d 273 (1955).
15. Laurel v. Turner, 80 Miss. 530, 31 So. 965 (1902).

question of whether the garnishee must have knowledge of the exemption before this duty is imposed. Some decisions have held that the garnishee must have knowledge of the exemption right.[16] However, with today's employment practices, which normally require certain personal information about the employee, it appears to this writer, that the employer would be hard put to convince the court of his ignorance of the facts which would entitle the employee to exemption.

In the light of these cases, the garnishee in Wyoming may be subjecting himself to double liability if he has not taken the precaution of notifying the debtor of the garnishment proceedings. As to the duty to answer, setting up the debtor's exemption, it is questionable, in view of Wyoming's exemption statute, whether the allegation by the garnishee would be of any avail. The statute states that the wages will be subject to the exemption, ". . . when it appears by the debtor's affidavit or otherwise, are necessary for the use of his family residing in this state, supported wholly by his labors. . . ."[17] The words "or otherwise" are unexplained and no Wyoming case appears that attempts to define their meaning. Yet, it may be argued that since the Wyoming Supreme Court has expressed its intention to give a liberal interpretation of the statute, for the benefit of the debtor,[18] it would seem plausible to suggest that the words "or otherwise" would allow the assertion of the exemption by means, other than the debtor's affidavit. It would then follow that the allegation by the garnishee to the effect that the debtor was married, resided in Wyoming, and his family was wholly supported by his labors, would satisfy the requirements of the statute. At the very least, it would serve the purpose of placing the court on notice of the exemption and perhaps the advisibility of citing the debtor into the proceedings so as to enable him to claim his right.

The obvious objection to the imposition of these duties, outside the statutory requirements, would be the heavy burden placed upon the garnishee. Statutory exemption is a personal right and should be exercised by the judgment debtor to whom the benefit inures. Yet, on the other hand, it may be argued that if it is the purpose of the state to alleviate the hardships of the debtor through partial exemption of his wage, it would appear inconsistent with their purpose to have a proceeding in law which could deny the debtor his opportunity of asserting his exemption claim. The courts should therefore be liberal in their recognition of remedies which would avail the judgment debtor the right to his exemption, even though it means going outside the literal requirements of the statutes.

The better solution lies in statutory amendment of wage garnishment procedure in aid of execution. Other states have met this problem by various statutory provisions. One solution is illustrated by the Minnesota statutes, which provide that the garnishee, in his answer, may state any

16. See note 8 supra.
17. See note 1 supra.
18. See note 2 supra.

claim of exemption known to him, on the part of the judgment debtor, enabling the garnishee to protect the debtor's exempt wages without the necessity of the judgment debtor's appearance.[19] Still, it would appear from this statute that if the garnishee was ignorant of the debtor's exemption, the debtor might find himself deprived of his exemption. A more satisfactory answer to the problem, which does not place the burden on the garnishee, is found in the Missouri statutes,[20] which provide notice to the judgment debtor in wage garnishment proceedings. This type of statute places the burden of asserting the exemption on the judgment debtor and rightly relieves the garnishee of any duties in behalf of the debtor.

Until some statutory change is made in Wyoming, the opportunity of the judgment debtor to avail himself of his wage exemption is a precarious one indeed. If the debtor fails to learn of the proceedings before the garnishee has paid the wage into the court, his exemption right has been lost. Even if the Wyoming courts would adopt the holding of courts which have implied duties outside the statutory requirements, garnishment in aid of execution would still remain a rather unsatisfactory procedure in relation to exemption rights. The garnishee would be saddled with a burden which, in all fairness, should be on the debtor for whom the exemption is intended. The only solution lies in statutory amendment, which would insure the judgment debtor an opportunity to assert his exemption, without placing burdensome duties upon the garnishee.

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LOSSES DEDUCTIBLE ON THE SALE OF A PERSONAL RESIDENCE

There seems to be a common misconception among accountants and lawyers that if a personal residence is rented before it is sold and there is a loss on the sale, the entire loss is deductible. The applicable section of the Internal Revenue Code merely states that in the case of an individual a deduction will be allowed if a loss is incurred in a trade or business, in any transaction entered into for profit, though not connected with a trade or business, and loss of property not connected with a trade or business, if such losses arise from fire, storm, shipwreck, or other casualty or from theft.[1] In July of 1956 the Treasury Department promulgated a new ruling on this section of the Internal Revenue Code. The new ruling states that if property is, before its sale, rented or otherwise appropriated to income-producing purposes and is so used up to the time of its sale, that portion of the loss, if any, that occurred subsequent to the conversion date is deductible. It is further stated that the basis for the deduction is either the fair market value at the time it was appropriated to income-producing

19. Minn. Comp. Stat. § 571.49 (1949).
20. Mo. Rev. Stat. § 525.290 (1949).

1. Int. Rev. Code of 1954, § 165.