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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 )  
8 Debtors. )  
9 )  


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


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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  
26 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)<sup>1</sup>, 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).<sup>2</sup> 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  
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22 <sup>1</sup> 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 <sup>2</sup> 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). . . .<sup>3</sup>

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

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<sup>3</sup> 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).<sup>4</sup> "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

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26 <sup>4</sup> 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.