

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: JEANNE FARREY, fka JEANNE SANDERFOOT,
Petitioner V. GERALD J. SANDERFOOT

CASE NO: 90-350

PLACE: Washington, D.C.

DATE: March 25, 1991

PAGES: 1 - 42

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JEANNE FARREY, fka JEANNE :

4 SANDERFOOT, :

5 Petitioner :

6 v. : No. 90-350

7 GERALD J. SANDERFOOT :

8 - - - - - X

9 Washington, D.C.

10 Monday, March 25, 1991

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:50 a.m.

14 APPEARANCES:

15 BRADY C. WILLIAMSON, ESQ., Madison, Wisconsin; on behalf
16 of the Petitioner.

17 HARVEY G. SAMSON, ESQ., Appleton, Wisconsin; on behalf of
18 the Respondent.

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C O N T E N T S

		PAGE
ORAL ARGUMENT OF		
BRADY C. WILLIAMSON, ESQ.		
On behalf of the Petitioner		3
HARVEY G. SAMSON, ESQ.		
On behalf of the Respondent		22
REBUTTAL ARGUMENT OF		
BRADY C. WILLIAMSON, ESQ.		
On behalf of the Petitioner		41

1 PROCEEDINGS

2 (10:50 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 90-350, Jeanne Farrey v. Gerald J. Sanderfoot.

5 Mr. Williamson, you may proceed.

6 ORAL ARGUMENT OF BRADY C. WILLIAMSON

7 ON BEHALF OF THE PETITIONER

8 MR. WILLIAMSON: Mr. Chief Justice, may it
9 please the Court:

10 This is a case about bankruptcy and divorce,
11 about the relationship between Federal law and State law,
12 and about fundamental fairness for one woman. Jeanne
13 Farrey left a Wisconsin courtroom about 4 years ago with
14 half of the property from her long marriage, only to lose
15 it all a few months later in the Federal bankruptcy
16 process. Yet it was not Jeanne Farrey who filed for
17 bankruptcy. It was her former husband, who, at least so
18 far, has been permitted to use the Federal Bankruptcy
19 Code, in the words of the dissenting Just -- judge in the
20 court of appeals, to steal from his former wife.

21 For many American families and for the judicial
22 system itself, the resolution of this mundane dispute
23 between Jeanne Farrey and Gerald Sanderfoot will have far-
24 reaching and lasting consequences.

25 QUESTION: Insofar as future cases -- it may be

1 of no help to your client or many others in her position.
2 So far as future cases, if the court had anticipated this
3 could it have just ordered the husband to execute a
4 mortgage on the property?

5 MR. WILLIAMSON: Justice Kennedy, that raises an
6 interesting question. The court may well have been able
7 to say to Mr. Sanderfoot sign a mortgage, but that would
8 not have made it, sir, any less a judicial lien under the
9 expansive definition that Congress has provided in section
10 101 of the Bankruptcy Code. One of the great difficulties
11 with this case is that, as the Seventh Circuit has decided
12 it --

13 QUESTION: Do you have settled authority for
14 that proposition?

15 MR. WILLIAMSON: No, Your Honor, there is no
16 settled authority. Indeed, as we have discussed in the
17 brief, one issue that may follow this case to this
18 courtroom, given the appropriate resolution of the case,
19 is what happens in consensual divorces, stipulated
20 divorces, where the parties come to the court and say
21 we've reached an agreement, it is not contested. But yet
22 in most States, including Wisconsin, the courts still have
23 to enter a judgment that adopts the stipulation. And
24 Congress, whatever it has done with the Bankruptcy Code,
25 has provided in the definition sections on lien and

1 judicial lien an all-encompassing definition.

2 This Court's decision --

3 QUESTION: So that in that hypothesis a property
4 settlement agreement which is recorded and the parties
5 exchange a deed and mortgage, and the court adopts --
6 enters a decree based on that, still the mortgage would be
7 a judicial lien?

8 MR. WILLIAMSON: Your Honor, Mr. Chief Justice,
9 I don't think there is any question about that. Under 101
10 U.S. Code subsection 32 a judicial lien means a lien
11 obtained by judgment, levy, sequestration, or other legal
12 or equitable process or proceeding. A number of lower
13 courts in situations like this have called this an
14 equitable lien, have tried to suggest that it is not a
15 judicial lien. But it would be very difficult for me to
16 come here and suggest that it isn't a judicial lien,
17 because it was a lien imposed by a court in a divorce
18 judgment, and that's going to happen whether or not it's a
19 stipulated divorce or, like this case, a divorce in which
20 every issue, including the division of property, was
21 contested.

22 QUESTION: Well, as the case comes to us you
23 concede that it's a judicial lien?

24 MR. WILLIAMSON: Yes.

25 QUESTION: And we have to worry, then, about the

1 meaning of section 522(f) and how that plays out in this
2 context, right?

3 MR. WILLIAMSON: That's correct, Justice
4 O'Connor.

5 QUESTION: At bottom, is that a matter of State
6 law as to when the lien fixes? And what is the State law
7 here that would determining the fixing, when the lien
8 fixed?

9 MR. WILLIAMSON: Your Honor, the definition of
10 the Federal statute, and to be precise the definition of
11 the phrase "the fixing of a lien" is a matter of Federal
12 law. And of course we contend that Congress used the
13 phrase "the fixing of" for a very deliberate reason. But
14 we have to understand, this entire debate occurs in --

15 QUESTION: Don't you think the Federal law of
16 necessity refers back to State law as to when and how a
17 lien is fixed?

18 MR. WILLIAMSON: Absolutely. And what happened
19 in this case was two things, two things that intimately
20 involve State law and State public policy. The divorce
21 judge said to the parties in this case I am going to award
22 the homestead to the husband, but as a condition of that
23 award I am going to make it subject to a lien in favor of
24 the spouse, the petitioner here, to ensure that there is a
25 fair and equitable division of State law. That very much

1 is a creature of State law and always should be.

2 The second State law issue in this case, Justice
3 O'Connor, is what the exemption itself means. Since at
4 least the 1898 Bankruptcy Act, Congress has specifically
5 deferred to the States in determining what the exemptions
6 are. The homestead exemption, of course, is just the most
7 common exemption. In fact for most families it may well
8 be the most important exemption. Section 522 of the code
9 itself provides a number of exemptions, most of them
10 geared to State law.

11 QUESTION: Yeah, but could you answer my
12 question and tell me under State law exactly when the lien
13 was fixed here?

14 MR. WILLIAMSON: Under State law, Your Honor,
15 the lien fixed at the moment the judge entered the divorce
16 judgment. In fact the district judge, the Federal
17 district judge in this case, found that the title interest
18 in Mr. Sanderfoot and the lien interest in Ms. Farrey were
19 created simultaneously in the same document in the same
20 divorce judgment.

21 QUESTION: Mr. Williamson, I am not sure that
22 our job here ought, you know -- the job before us is to
23 make all these divorce proceedings come out in a seemingly
24 fair and happy fashion. But even if that were our task, I
25 don't see how your theory of the case achieves it any

1 better than the other side. Would it not be the case that
2 even if we accept your principal theory, if the husband --
3 if the property was in the husband's name and then this
4 same thing happened, it was not in their joint names, it
5 was solely in his name, and if there is no State law that
6 automatically gives the wife a joint tenancy, then your
7 theory of the case would still allow the husband to get
8 off scott free, as happened here. Wouldn't that be the
9 case, because it would not have fixed -- right? He would
10 have had the property before the lien was fixed.

11 MR. WILLIAMSON: Justice Scalia, if Mr.
12 Sanderfoot had sole title to the house, he didn't, but if
13 he did --

14 QUESTION: Yes.

15 MR. WILLIAMSON: And then the divorce court in
16 its judgment awarded a lien, imposed a lien on it, then we
17 would probably not be here today and I would not quarrel
18 with the court's order or suggestion.

19 QUESTION: Right. So the point is that your
20 prologue about how, you know, not going along with you
21 will make for unfair divorce proceedings, really sort of
22 misses the point, because no matter what you do you're
23 going to have some unfair divorce proceedings, even on
24 your theory of the case.

25 MR. WILLIAMSON: No, Justice Scalia, and if

1 you'll forgive me, I do want to quarrel with your premise.
2 Because what we're asking the Court to do is not guarantee
3 that divorce judgments are equal across the country, even
4 though virtually every State now provides for some kind of
5 equitable 50-50 division subject to different factors.
6 What we're asking this Court to do is to prevent the
7 Federal Bankruptcy Code from being used as a device to
8 upset a fair and equitable division. There should not be
9 any confusion on this point.

10 QUESTION: You're not saying that. You're
11 saying it shouldn't be used to upset a fair division
12 unless the husband has sole title to the property from the
13 outset. Then it can be used to upset a fair division.
14 Right?

15 MR. WILLIAMSON: If the husband had sole title,
16 Your Honor, the trial judge could have, and no doubt would
17 have, taken other steps to correct the difficulty.

18 QUESTION: On that point, I thought Wisconsin
19 law was quite specific that all property of the spouses is
20 presumed to be marital property, and that each spouse has
21 an undivided one-half interest. So isn't that true
22 despite the State of the title?

23 MR. WILLIAMSON: That's precisely correct, Your
24 Honor.

25 QUESTION: I'm not sure why you conceded to

1 Justice Scalia, then, that if the property had all been in
2 the husband's name you wouldn't be here today. It seems
3 to me you'd have very much the same argument.

4 MR. WILLIAMSON: We would have a more difficult
5 case. Justice Scalia's hypothetical --

6 QUESTION: I thought you weren't going to be
7 here at all.

8 (Laughter.)

9 MR. WILLIAMSON: Justice Kennedy, I am grateful
10 to be here under any circumstances.

11 (Laughter.)

12 MR. WILLIAMSON: Justice Scalia's hypothetical
13 --

14 QUESTION: You pushed me beyond my hypothetical.
15 I said, I said assuming that the State did not have an
16 such law, and you sort of volunteered that Wisconsin did.
17 And I don't know whether Wisconsin does or doesn't,
18 frankly.

19 MR. WILLIAMSON: Justice Scalia, Justice Kennedy
20 is absolutely correct. And as we make clear, I think, in
21 our briefs, Wisconsin law -- and there is just no dispute
22 about this -- Wisconsin law provides for co-ownership of
23 marital property. The entire marital estate is co-owned.
24 And that's why in this case it really doesn't matter
25 whether Ms. Farrey and her husband held the title as joint

1 tenants, tenants-in-common, tenants by the entirety, or
2 some other device.

3 QUESTION: Legally co-owned or equitably co-
4 owned?

5 MR. WILLIAMSON: Both.

6 QUESTION: Legally co-owned?

7 MR. WILLIAMSON: Yes, sir.

8 QUESTION: So it really doesn't matter whether
9 you take it out in your own name or not.

10 MR. WILLIAMSON: It does not. In addition, in
11 1986, effective in early 1986, Wisconsin passed a form of
12 marital property law that reinforces the statutory and
13 case law that up to then had made precisely that point.

14 MR. WILLIAMSON: But it's your theory that the
15 marital community is really an entity of its own and that
16 that changes when there is a divorce decree entered and
17 the property is dissolved -- and the property is
18 distributed?

19 MR. WILLIAMSON: Yes. At that point the divorce
20 judge has to make a decision about how to divide this
21 property. And the practical problem that the divorce
22 judge faced in this case is really quite commonplace.
23 This family had a home and some land in Hortonville,
24 Wisconsin, not too far from Greenbay and Appleton, and it
25 was their primary asset. It may have been their only

1 asset of any value.

2 Yet a home by definition, except for example in
3 someone's property law class, is indivisible. And the
4 judge had to make a difficult decision of to whom would he
5 award that home. He chose Mr. Sanderfoot. But he also
6 was committed to making a precisely even distribution of
7 the marital property. This divorce judge did everything
8 right. He followed State law to the letter. And Ms.
9 Farrey walked out of that courtroom thinking that she had
10 gotten as best she could get. She got half of the marital
11 estate, and what could be better than a lien, a security
12 interest imposed by a judge, to protect that interest.

13 It was better than a mortgage until, of course,
14 a few months later Mr. Sanderfoot began the bankruptcy
15 process, filed a motion under 522(f), had that motion
16 denied by the bankruptcy judge, and then in relatively
17 quick succession reversed by the Federal district judge,
18 and in a 2 to 1 decision reversed by the court of appeals.

19 QUESTION: Mr. Williamson, can I ask you a
20 background question? Under the old Bankruptcy Code we had
21 this 4 month rule, that liens within the 4 month period
22 could be avoided. And that seems to have gone up in thin
23 air somewhere. I don't know what happened to it. But are
24 there any cases under the old code where this sequence was
25 filed -- of course here there was more than 4 months, but

1 where this series -- sequence of events was followed
2 within a 4-month period, where the bankruptcy occurred
3 less than 4 months after the divorce?

4 MR. WILLIAMSON: The -- Mr. Justice Stevens, in
5 the respondent's brief they were unable to cite a single
6 case pre-code in which this happened, although under
7 section 67(a) of the Bankruptcy Act it certainly could
8 have happened. Our contention is that when Congress
9 overhauled the Bankruptcy Code it in effect replaced 67(a)
10 with 522(f)(1) and this interesting phrase, the fixing of
11 a lien. It also replaced 67(a) with section 547 of the
12 code, which are the comprehensive preference powers of the
13 trustee. This is the first case that has squarely
14 presented the issue of the phrase "the fixing of." Of
15 course, the Court may touch on this issue in another case
16 that it heard argued on November 5, Owen v. Owen,
17 involving a Florida case.

18 QUESTION: One reason I asked the question is I
19 don't know what this word "the fixing of" means, and
20 whether it means -- when I first looked at it I thought it
21 meant fixing within a 4 month period, but then the 4
22 months just isn't there anymore. If it meant fixing after
23 the bankruptcy, obviously you win. If it means ever
24 fixed, is -- which I gather your opponent -- it's a
25 strange use of words. It's a fixing of a lien. Is there

1 any -- and the other thing that's puzzling about it, they
2 talk, a very brief excerpt from the legislative history
3 talking about the rush to the courthouse and so forth, but
4 there's no time limit on the rush in the statute, is
5 there?

6 MR. WILLIAMSON: That's absolutely correct, Your
7 Honor.

8 QUESTION: Is there anything in the legislative
9 history that tells us what happened to the 4-month period
10 or why they got rid of it?

11 MR. WILLIAMSON: No, sir. The single paragraph
12 that you have referred to from the legislative history is
13 the only substantive reference in all the debate, in all
14 the committee hearing, to this phrase. It's our
15 contention, though, sir, that the phrase "the fixing of"
16 has to mean something. It's an active phrase. It's not
17 passive. And Mr. Sanderfoot would have us ignore the
18 phrase. He would have the statute read, and I'll read it
19 without the phrase, Congress simply would have provided,
20 Mr. Sanderfoot suggests, that the debtor may avoid a lien
21 on an interest of the debtor. That's Mr. Sanderfoot's --
22 position. But that's not what the code says. It uses the
23 phrase "the fixing of." Our contention, of course, is
24 that it has to have been a fixing on an interest that the
25 debtor previously held.

1 Now, Mr. Sanderfoot had an interest in the
2 homestead equivalent to Ms. Farrey's interest in the
3 homestead pre-divorce. But that's not what the lien
4 attached to. The lien attached to the entire interest.
5 And Mr. Sanderfoot would not have received that entire
6 interest but for the lien.

7 Now --

8 QUESTION: Could you say that the lien fixed
9 part on his interest and part on her interest, both of
10 which are recognized as being one-half interest, and that
11 one is avoidable and the other is not?

12 MR. WILLIAMSON: Well, we have thought about
13 that possibility, Your Honor, and in the first place it
14 assumes that Ms. Farrey could have had a lien on her own
15 interest which, whatever the doctrine of merger might say,
16 seems, seems a bit awkward to have a lien on your own
17 interest. But it is possible for the divorce judge to
18 have said I will place a lien on Mr. Sanderfoot's half
19 interest. Could have, but that didn't happen here. And
20 it would have been unnatural for that to have happened
21 here because everything about this divorce case was
22 ordinary, everything about this divorce case was done by
23 the book under State law, until it got to the bankruptcy
24 process.

25 QUESTION: I guess you say that a whole interest

1 in real estate, a whole fee interest, is equivalent to two
2 divisible half interests, but it's a different interest
3 from two indivisible half interests? To have an
4 indivisible half interest in property is simply a
5 different, different estate. It's not half of the fee.
6 If it were half of the fee you could say that he did have
7 the interest, even before the decree was entered, couldn't
8 you?

9 MR. WILLIAMSON: Yes, you could. Keep in mind,
10 Justice Scalia, that in this case the Federal district
11 judge who overruled, reversed the bankruptcy court judge,
12 found that what had happened under State law was that the
13 divorce decree eliminated everybody's interest, and then
14 in a split second, upon the entry of the order, created
15 new interests. And Mr. Sanderfoot walked out of the
16 courtroom, not literally but in effect, owning the entire
17 homestead subject to the lien. As the dissenting judge in
18 the Seventh Circuit put it, there was not an instant that
19 Mr. Sanderfoot owned title without the lien. And that's
20 really a critical, in fact dispositive, fact in this case.

21 QUESTION: Would you say the same thing if there
22 were two tenants-in-common, not husband and wife, and
23 there was a partition suit and the court ordered a sale
24 from one to the other?

25 MR. WILLIAMSON: Probably not.

1 QUESTION: What's the difference?

2 MR. WILLIAMSON: Two differences. One is a
3 matter of law. What we had here under State law was co-
4 ownership.

5 QUESTION: That's the one I'm interested in.

6 MR. WILLIAMSON: It's clear, Justice Kennedy,
7 and has been for, probably since the State became a State
8 in 1848, that Wisconsin has recognized a marital estate as
9 being co-owned. There is a statute that says that, there
10 are cases -- case after case from the State supreme court
11 that say just that.

12 The other factor -- that's the legal
13 explanation. The other explanation, the other response is
14 practical. This was a man and a woman, a husband and a
15 wife, who owned the home, maintained the home. In fact
16 they built the home together. This was not an arms-length
17 commercial transaction, not a household finance deal,
18 which somebody bought a refrigerator and had a purchased
19 money security interest. This was two equals who came to
20 the court, asked for a division of their property, and got
21 it, evenly, equally. But again, 3 months later the
22 bankruptcy process began, and the reason we're here is to
23 ask this Court to determine the impact of the Federal
24 Bankruptcy Code on State divorce law.

25 QUESTION: Was any member of the Seventh Circuit

1 panel a Wisconsin jurist?

2 MR. WILLIAMSON: No, sir. The opinion was
3 written by, I believe, a district judge at the time, Judge
4 Ripple. The dissenting justice -- judge, of course, was
5 Judge Posner from Chicago. None of the judges had a
6 Wisconsin connection, although they made specific
7 references, as indeed they should have, to State law.
8 This case is about the intersection of State law and the
9 Federal Bankruptcy Code.

10 QUESTION: I suppose there is no question but
11 what the Bankruptcy Code would discharge the husband from
12 any -- just from financial obligations to the wife?

13 MR. WILLIAMSON: Justice White, not, not the
14 slightest doubt in the world.

15 QUESTION: So that if the court orders the
16 husband to pay the wife and sign a note for \$100,000, it
17 can be discharged at bankruptcy?

18 MR. WILLIAMSON: Absolutely. I think the --

19 QUESTION: Yes, but how about alimony or support
20 money? That wouldn't be discharged, would it?

21 MR. WILLIAMSON: It would not, Justice Stevens,
22 under section 523(a)(5). But that's precisely the point.
23 Congress, in the Bankruptcy Code, when it has chosen to
24 effect State divorce law has done so explicitly, directly,
25 and clearly. Section 523(a)(5) is a perfect example.

1 What Mr. Sanderfoot has asked us to do here is to accept
2 the suggestion that Congress made a deliberate decision to
3 impose Federal policy on the States, to increase the
4 workload of the Federal judiciary, all by implication.
5 Because there is not the slightest piece of evidence in
6 the legislative history that Congress had any idea this
7 would be the result.

8 QUESTION: Well, the Bankruptcy Code discharges
9 a debt, but you say it can't discharge a lien.

10 MR. WILLIAMSON: That's absolutely right, Your
11 Honor. And since at least the Bankruptcy Act of 1898,
12 probably the Bankruptcy Act of 1867 as well, this Court in
13 a series of decisions has made it clear that there is a
14 difference between a debt, which may be discharged, and
15 the security for that debt.

16 Let me use this case as a perfect example. When
17 Ms. Farrey and Mr. Sanderfoot went to the savings and loan
18 to borrow money for the house they signed a mortgage.
19 That mortgage remains a record. That mortgage remains an
20 obligation, an encumbrance on the homestead. And neither
21 Federal bankruptcy law nor State law of any kind would
22 permit that mortgage to be expunged, to be discharged, to
23 be exempted. Yet we have Jeanne Farrey, who was a partner
24 in the marriage for 20 years, and her interest, the lien
25 she thought she had, is expunged like that by the

1 bankruptcy process.

2 QUESTION: I guess they should have written the
3 statute differently, because the statute does not say that
4 mortgages can be discharged, and it says that judicial
5 liens can. I mean, that may well be an inequity, but
6 that's what the language says. Why does it say that
7 mortgages can't but judicial liens can? Do you have any
8 idea why that is?

9 MR. WILLIAMSON: Your Honor, in 522(c)(2)(A)(i)
10 Congress has codified the principle that this Court
11 established in the Bullard case, which says that security,
12 valid security interests pass through bankruptcy. Again,
13 the savings and loan mortgage in this case is a perfect
14 example. The savings and loan is going to get paid, and
15 if it doesn't get paid it's going to foreclose on its
16 mortgage, have the home sold, and then it'll get paid.
17 But because of the bankruptcy process Jeanne Farrey
18 doesn't have that same alternative.

19 QUESTION: Why does the savings and loan
20 mortgage pass through bankruptcy? Because it's a
21 purchased money mortgage?

22 MR. WILLIAMSON: No, sir. Because it is a valid
23 security interest. And again, this Court has said in
24 Bullard, a case in the 19th century, and in a number of
25 cases since then, that security interests survive

1 bankruptcy; they pass through.

2 QUESTION: Straight bankruptcy. Liquidation
3 bankruptcy.

4 QUESTION: Mr. Williamson, why, if your theory
5 should prevail, why didn't Congress just add another word
6 in 523(a)(5) and instead of excepting merely child
7 support, alimony, and maintenance obligations, put in some
8 other category there that would provide an exception for
9 security for the property settlement?

10 MR. WILLIAMSON: Your Honor, clearly Congress
11 could have done that, but we believe that the Bankruptcy
12 Code, and there is plenty of legislative history on this
13 point, supports the conclusion of Congress and our
14 contention that there was no need for that kind of
15 language because security interests, like mortgages,
16 always survive bankruptcy. They are not dischargeable.
17 The personal obligation may not be enforceable. That's
18 what we believe dischargeability means.

19 But the underlying security survives. It
20 remains attached to the real estate. I believe, sir, that
21 that's a cardinal principle of bankruptcy, and it's
22 certainly a cardinal point in our argument.

23 QUESTION: Excuse me, isn't a judicial lien a
24 security interest? It's -- I mean, you get a judgment and
25 you get a judicial lien as security for the payment of

1 that judgment. That's a security interest.

2 MR. WILLIAMSON: Justice Scalia, the difficulty
3 is that Congress, in defining a security interest, limited
4 it, and it's in subsection 47 of the definitional
5 sections, limited that interest to consensual liens. It
6 defined a lien, defined a judicial lien, and it defined a
7 security interest. Even if this were a security interest
8 it's hard to escape the fact that it was a security
9 interest imposed in a judicial proceeding which, I believe
10 unfortunately, makes it a judicial lien.

11 We ask that this Court reverse the judgment of
12 the U.S. court of appeals and that it reinstate the
13 judgment of the bankruptcy court which properly refused to
14 avoid Jeanne Farrey's homestead lien against her family's
15 homestead.

16 Mr. Chief Justice, I would reserve the balance
17 of my time.

18 QUESTION: Very well, Mr. Williamson. Mr.
19 Samson, we'll hear now from you.

20 ORAL ARGUMENT OF HARVEY G. SAMSON

21 ON BEHALF OF THE PETITIONER

22 MR. SAMSON: Mr. Chief Justice, and may it
23 please the Court:

24 On May 4, 1987, Gerald Sanderfoot filed a
25 petition for relief pursuant to Chapter 7 of the United

1 States Bankruptcy Code. On that date Mr. Sanderfoot was
2 burdened with nearly \$50,000 of unsecured debt, not
3 including any amounts owed to his former wife. Mr.
4 Sanderfoot sought the protection of the Bankruptcy Code,
5 as thousands of others, to produce a fresh start. This
6 case would have ended like thousands of others except for
7 the fact that a divorce court 8 months prior, on September
8 12, 1986, had awarded Ms. San -- Ms. Farrey a judicial
9 lien in a homestead awarded to Mr. Sanderfoot. The issue
10 before the Court is whether --

11 QUESTION: (Inaudible) her half interest in the
12 house.

13 MR. SAMSON: That's correct, Justice White.
14 Pursuant to -- section 767.255 of the Wisconsin statutes,
15 which allows a divorce court to divest and transfer title.
16 It's very specific.

17 The issue before the Court in this case is
18 whether that lien is avoidable pursuant to section
19 522(f)(1) of the code. Article I, section 8 of the United
20 States Constitution provides that the Congress shall have
21 the power to establish uniform laws on the subject of
22 bankruptcy throughout the States.

23 The Bankruptcy Code was passed in 1978 after
24 nearly 10 years worth of work. It was a significant
25 departure from the prior Bankruptcy Act of 1898. It was

1 not, however, a departure from the primary purpose of
2 bankruptcy, which was and is to provide overburdened
3 debtors with the ability to start over free from his or
4 her other debt. And that debt has to be incurred prior to
5 the filing of the bankruptcy.

6 Bankruptcy has been built on the premise that
7 most creditors will have to forfeit their right to
8 payment. Ms Farrey in this particular case and in oral
9 argument has made much of the economic impact of this
10 bankruptcy on her, that it is not fair and that it divests
11 her of her property. All creditors in a bankruptcy are
12 deprived of some property using that term in its broadest
13 sense.

14 QUESTION: But sure the Bankruptcy Code isn't
15 designed to let you start over with part of someone else's
16 house.

17 (Laughter.)

18 MR. SAMSON: I don't disagree, Mr. Chief
19 Justice. The problem is that in the divorce court the
20 property was specifically awarded to Mr. Sanderfoot, very
21 specifically. The court said in its very first statement,
22 the home of the -- the home is awarded to the respondent,
23 Mr. Sanderfoot. And then after a long statement regarding
24 property division, awarded a money judgment, in effect, to
25 Ms. Farrey for \$29,000 plus. It is not a half of the

1 house interest.

2 QUESTION: But it's secured by that, is it not?

3 MR. SAMSON: We don't believe that for
4 bankruptcy purposes that it is a security interest.
5 Security interest is defined by bankruptcy --

6 QUESTION: No, but I mean just in common
7 parlance there was a requirement this amount of money be
8 paid and the obligation to pay it was secured by some sort
9 of an interest, a security interest on the house.

10 MR. SAMSON: It was --

11 QUESTION: That's correct, isn't it?

12 MR. SAMSON: It was secured by some sort of
13 lien, yes.

14 QUESTION: Imposed by the bankruptcy court -- by
15 the divorce court.

16 MR. SAMSON: Imposed by the divorce court. And
17 that, Mr. Chief Justice, is the key here. In bankruptcy
18 Congress has defined certain very key words. One of the
19 key words that it has defined is judicial lien. A
20 judicial lien, as Mr. Williamson indicates, is defined as
21 a lien obtained by judgment, levy, sequestration, or other
22 legal or equitable process or proceeding. That is in
23 section 101(32). In section 101(33) lien is defined as a
24 charge against or interest in property to secure payment
25 of a debt or performance of an obligation. In 101(46) the

1 Bankruptcy Code defines security agreement as meaning an
2 agreement that creates or provides for a security
3 interest, and (47) defines security interest as meaning a
4 lien created by agreement.

5 Now, one of the difficulties with this entire
6 case is the fact that this is a bankruptcy case. It is
7 not a family law case. And bankruptcy defines the terms.

8 QUESTION: Mr. Samson, am I correct that you
9 acknowledge that if Mr. Sanderfoot had bought this real
10 estate subject to a judicial lien, there was already a
11 judicial lien on it against the former -- to secure a debt
12 of the former owner, he buys the real estate with a
13 judicial lien, he could not get that lien discharged in
14 bankruptcy? Is that correct?

15 MR. SAMSON: If I understand your question --

16 QUESTION: Because he had no interest when the
17 lien fixed.

18 MR. SAMSON: If I understand your question,
19 Justice Scalia, what you're asking is if there was a
20 judgment against Mr. Sanderfoot before he purchased?

21 QUESTION: No, no, no. If he purchased the
22 property from someone -- let me make it easier. Suppose
23 Sanderfoot, who had a lien against the property, a
24 judicial lien against it, had sold the property to a third
25 person, and then that third person went bankrupt. The

1 third person having purchased the property with a lien,
2 subject to the lien, would that third person have been
3 able to remove the lien in bankruptcy?

4 MR. SAMSON: I am having some difficulty because
5 in the State of Wisconsin, I think as in most other
6 States, a warranty deed requires that you provide a deed
7 free and clear of all those types of questions.

8 QUESTION: I didn't say it was a warranty deed.
9 He -- it was a quit claim.

10 MR. SAMSON: A quit claim deed?

11 QUESTION: Sure.

12 MR. SAMSON: In my opinion with a quit claim
13 deed, yes, it would be subject to the prior owner's lien,
14 assuming that you could not avoid the lien under State
15 law, which would allow a homestead exemption clause.

16 QUESTION: But the new owner would not be able
17 to avoid that lien under the Bankruptcy Code, because the
18 lien did not fix upon any interest of that new owner.
19 Correct?

20 MR. SAMSON: If he paid for it, it may well fix
21 on an interest of his, assuming he can -- it's a homestead
22 of some sort.

23 QUESTION: I don't understand what you're
24 saying.

25 MR. SAMSON: Well, the difficulty with the --

1 QUESTION: Are you saying that even if I buy
2 property that's already subject to a lien, the lien has
3 never attached to any interest of mine; it attached to
4 somebody else's interest and then I bought that interest
5 already subject to the lien, I can get rid of that in
6 bankruptcy?

7 MR. SAMSON: No, I don't believe so.

8 QUESTION: Okay.

9 MR. SAMSON: I don't believe so.

10 QUESTION: I didn't think you believed so.

11 QUESTION: Why not, under the plain language of
12 the code?

13 MR. SAMSON: Because, again, it's got to fix on
14 an interest -- and, with all due respect to Justice
15 Scalia, I don't think that it's likely that that kind of
16 situation is going to occur, strictly because --

17 QUESTION: I don't understand why it's so
18 improbable. Say when he bought this property it had a
19 mortgage on it, he bought it subject to the mortgage.
20 There's also a lien on the property because there's a
21 judgment against the prior owner for \$1,000. Why wouldn't
22 you sometimes buy property subject to those two liens? I
23 don't know why that's impossible.

24 MR. SAMSON: It's perfectly conceivable --

25 QUESTION: And if that's true, I don't know why

1 the plain language of the code would have a different
2 impact in that situation.

3 MR. SAMSON: Under the --

4 QUESTION: If fixing means fixed at any time in
5 the past. If fixing refers to some limited period, like 4
6 months or after bankruptcy, of course they are different.

7 MR. SAMSON: If it's unlimited I don't believe
8 that there is a problem with that. It would be subject to
9 that, I believe.

10 QUESTION: What in the code justifies that?
11 What language of the code do you rely on for that
12 position?

13 MR. SAMSON: I think we're having some semantic
14 difficulty here.

15 QUESTION: You just think it's common sense that
16 it can't apply that far.

17 MR. SAMSON: I don't think it would be
18 avoidable. It is not a debt of the person who has
19 purchased --

20 QUESTION: No, but neither is Mrs. -- the
21 petitioner's lien a debt. It's security for a debt. See,
22 Mr. Samson, I thought the reason you said it is that there
23 was no lien fixed on an interest of the debtor. That's
24 what the code says. The debtor may avoid the fixing of a
25 lien on an interest of the debtor. And in the

1 hypothetical I gave you that lien had never fixed on an
2 interest of the debtor.

3 MR. SAMSON: That's correct.

4 QUESTION: Right. Okay. Now, I haven't even
5 gotten to my question. I'm just trying -- if that is so,
6 really all we're arguing about in this case, I guess, is
7 whether for purposes of the Federal bankruptcy law the --
8 it should be deemed that your client got the property
9 simultaneously with the, with the judgment lien, or did he
10 get the property first and then the judgment lien in the
11 next split second attached to the property. I suppose
12 that's, that's really the theory. Because if he got the
13 property first and then the lien attached he could avoid
14 it, but if he sort of took the property with the lien
15 already there he couldn't. Isn't -- I mean, that's what
16 it comes down to, doesn't it?

17 MR. SAMSON: In the broadest sense, yes, but he
18 always had an interest. His interest didn't change as
19 drastically as Ms. Farrey's.

20 QUESTION: I understand.

21 QUESTION: Well, he had a half interest. I am
22 still not sure why the lien can't be avoided on the
23 interest that he received from the wife but not on his.

24 MR. SAMSON: In the State of Wisconsin --

25 QUESTION: Or vice versa.

1 MR. SAMSON: In the State of Wisconsin, Justice
2 Kennedy, there is a presumption that all property in a
3 marriage is marital in nature and subject to division.
4 There has been confusion since 1986 in the State of
5 Wisconsin since the passage of the Wisconsin Marital
6 Property Act regarding the term marital property. And the
7 State, a State appeals court in the Kuhlman case, which we
8 have cited in our brief, specifically says that marital
9 property law, which is chapter 766 of the Wisconsin
10 statute, has no effect whatsoever on divorce. None.

11 QUESTION: Is either party, is either spouse
12 free to alienate his or her share of the marital property
13 during marriage?

14 MR. SAMSON: Not in the State of Wisconsin. But
15 that has been the law since well prior to that. However,
16 in the State of Wisconsin, section 767.255, which is the
17 section that allows division of property, specifically
18 States that the court shall divest and transfer title as
19 it deems appropriate.

20 QUESTION: Well, that seems to me, then, to
21 illustrate Justice Scalia's point that there is something
22 to the argument that the nature of the property changed in
23 a very substantive and generic way at the moment of the
24 marital dissolution.

25 MR. SAMSON: It did change. Sole ownership in

1 Mr. Sanderfoot. And thereafter --

2 QUESTION: And he received property with a new
3 character, but at that very moment it also had a lien.

4 MR. SAMSON: It did not have the lien until the
5 point that all of the property division had been
6 concluded. And this could have been solved very simply by
7 the divorce court by awarding the property, which the
8 court has the power to do, as tenants-in-common with a
9 provision that Mr. Sanderfoot could purchase Ms. Farrey's
10 interest at a certain point in time for X number of
11 dollars.

12 QUESTION: Of course, then, if she had gone
13 bankrupt the home would have had to have been sold. So we
14 still have the problem of homes being involuntarily sold
15 because of the bankrupt -- bankruptcy of, in this case,
16 the party that didn't get the property.

17 MR. SAMSON: No, the property that -- oh, in
18 your case, yes, that didn't. But conceivably that's true.
19 It is in bankruptcy not the economic circumstances of the
20 creditors on which the focus occurs. Also, this, in our
21 opinion, is not a question of fairness to creditors, for,
22 as we have stated, bankruptcy is not fair to creditors.
23 The case itself --

24 QUESTION: Mr. Samson, let me try again. I
25 guess we're all agreed that if the lien attaches before

1 you acquire the property it cannot be discharged. If it
2 attaches after you acquire the property, or fixes after
3 you acquire the property, it can. And we're faced here
4 with a situation right in the middle. It's simultaneous.
5 And we're trying to figure out how the Bankruptcy Code
6 would treat that.

7 Why shouldn't I be guided by the fact that under
8 (f)(1)(2) the code makes it clear that it does not want to
9 allow the discharge of purchased money security interests,
10 that is to say even though you can get out of security
11 interests in personal property, all sorts of it, you
12 cannot get out of purchased money security interests in
13 personal property.

14 Now, why shouldn't I think that the code feels
15 the same way about real estate, that basically where there
16 is a simultaneously, a simultaneous creation of your
17 interest and the lien, which is what happens with a
18 purchased money security interest, you should not be able
19 to get out of it? Don't you think that the drafters of
20 the code, the people who did (f)(2) would have felt that
21 way about the question before us, that this is sort of a
22 purchased money-type arrangement?

23 MR. SAMSON: No, Justice Scalia, I don't think
24 so, because the code also defines purchaser as being a
25 voluntary transferee.

1 QUESTION: Oh, I'm not saying it technically
2 comes within it. I'm just saying it's the same philosophy
3 if it's, you know, the simultaneous fixing of the lien
4 with the acquiring of the interest.

5 MR. SAMSON: Again, that is one of the key
6 terms, is "an interest." And I don't believe that you can
7 look at that, at the term the fixing of a lien, without
8 looking at the next phrase, an interest. It doesn't say
9 the interest. It doesn't say all of the interest. It
10 says an interest, and "an" is the dictionary equivalent of
11 the term "any." So if you start, if you look at that
12 statute and read it with an equivalent term in it, it says
13 the fixing of a lien on any interest of the debtor in
14 exempt property.

15 And -- you had asked a question previously
16 regarding the question of if it's fixed prior to
17 bankruptcy or fixing after the filing, clearly it cannot
18 fix after the filing because there's an automatic stay.
19 It would not occur in any event.

20 The question is, the term "fixing," is it used
21 as a term of art, which I don't believe it is. I think it
22 has to be on an interest that was in existence on the date
23 of bankruptcy. Because bankruptcy presumes that we look
24 at the debtor on the date of bankruptcy, not some time
25 prior to the date of bankruptcy. The estate is defined in

1 section 541 as that as in existence on the date of the
2 filing, and on the date of the filing Mr. Sanderfoot was
3 the only one with any interest in this particular piece of
4 property.

5 I think that the more basic --

6 QUESTION: Yes, but if you look at the date of
7 the filing, it seems to me you ought to look at the fixing
8 as of the date of the filing too. I think that argument
9 proves too much for you. Because if you look at
10 everything at the date of the filing, you say you're only
11 concerned about post-filing fixing. Now, I understand
12 there's another objection, the automatic stay --

13 MR. SAMSON: Correct.

14 QUESTION: -- but it seems to me there's some
15 tension between your saying well, for fixing purposes we
16 go back 100 years, but for, to cancel out all old judicial
17 liens, but for measuring what we're talking about we look
18 at the date of filing. I think there's some tension
19 there.

20 MR. SAMSON: Well, I think that the, that 522(f)
21 specifically says that we look at judicial liens
22 regardless of when they were filed or when they attached.

23 QUESTION: Well, why does it use the word avoid
24 the fixing of? That's a strange way to describe the
25 concept of avoiding liens previously fixed.

1 MR. SAMSON: I would tend to agree. I would
2 tend to agree, Justice White. I think it is, and I think
3 that we can say that although Congress has not been real
4 good at sometimes putting language in the statutes, that
5 we have to look at the overall situation and the policy of
6 Congress under the circumstances.

7 QUESTION: So you just read it out? I mean, as
8 I understand your theory, Congress might as well have said
9 instead of the fixing of a lien on an interest of the
10 debtor, they might as well -- the debtor may avoid a lien
11 on an interest in property. But they didn't say that.

12 MR. SAMSON: They didn't say that, and we need
13 to look at what fixing is. But I think that fixing has to
14 look, be guided by the term "an interest," again. And
15 clearly Mr. Sanderfoot, when this lien attached, had an
16 interest in this home. And under the circumstances I
17 think that it obviously impairs an interest of his.
18 Again, the code does not require that it impair a total
19 interest.

20 QUESTION: Is an explanation that the lien might
21 still exist on other property, so that the lien itself
22 still remains but the fixing of the lien on the interest
23 of the debtor is avoided? I don't know if that helps or
24 not.

25 MR. SAMSON: Well, I think, Justice Kennedy,

1 that clearly if you cannot claim property exempt, the lien
2 would still stay on that property. The question of
3 commercial property is not brought up. In this particular
4 case we are talking about congressional intent. That is
5 the question. Did Congress intend to treat this type of
6 lien to secure a property division payment differently
7 than every other judicial lien? We do not believe that
8 the Seventh Circuit's determination is contrary to either
9 the clear language of the statute, nor the legislative
10 intent. Again --

11 QUESTION: On legislative intent, what do you do
12 with the snippet from the legislative history about rush
13 to the courthouse?

14 MR. SAMSON: Well, the legislative history on
15 rush to the courthouse, Justice Stevens, is in a line from
16 the House report. The Senate report does not contain that
17 language, nor does the final form of 522. 67(a) in the
18 act did. It was very specific. There were two
19 requirements in 67(a), 4 months within the filing, plus
20 the debtor had to be insolvent. Both of those were
21 terminated totally in this situation. Had Congress
22 intended there to be a time limit, they would have said
23 that.

24 Now, the legislative history on a lot of the
25 code, and one of the specific ones is 523(d)(1), the

1 Senate had \$10,000 in for a homestead exemption and the
2 House had \$7,500, and it ended up being \$7,500.

3 QUESTION: But my question was what do you do
4 with the snippet of legislative history, and you say it
5 really is inconsistent with what they did?

6 MR. SAMSON: Correct.

7 QUESTION: Yeah.

8 MR. SAMSON: In determining avoidability it will
9 be the Federal bankruptcy court --

10 QUESTION: It's inconsistent with what they did
11 and with what they intended to do is really what you're --

12 MR. SAMSON: In my opinion it is, because it's
13 got to be inconsistent if the language of the law doesn't
14 say within so many months, days, years, or whatever.

15 QUESTION: Mr. Samson, can I come back to this
16 language again, it has to be a fixing of a lien on an
17 interest of the debtor in property, and you say it can be
18 any interest of the debtor. Well, surely it has to be an
19 interest that he now possesses, or that he possesses at
20 the time of the bankruptcy?

21 MR. SAMSON: Correct.

22 QUESTION: Right? Because there's no problem
23 about avoiding the lien on property he doesn't possess.

24 MR. SAMSON: Correct.

25 QUESTION: Okay. And so the point is did he

1 possess at the time of the bankruptcy an undivided
2 interest in the entire property?

3 MR. SAMSON: Yes. Under section 767.255 of the
4 Wisconsin statutes, the court had awarded all of the
5 property to him. He owned that property. No one else had
6 an ownership interest.

7 QUESTION: Did his property interest -- did he
8 have a property interest that survived the divorce?

9 MR. SAMSON: I believe he did.

10 QUESTION: Did -- but she did not?

11 MR. SAMSON: No. He interest was changed from a
12 property interest, an interest in her property --

13 QUESTION: And where did that interest go?

14 MR. SAMSON: The interest went to Mr.
15 Sanderfoot.

16 QUESTION: Yes. And so that was a new transfer,
17 and he took it subject to the lien at that time.

18 MR. SAMSON: The one-half interest, but the
19 statute says an interest. And again, this is not a
20 division of the house itself. This is a division of an
21 entire marital estate for divorce purposes.

22 QUESTION: The statute talks about interests,
23 not properties.

24 MR. SAMSON: That's correct. We believe that
25 the plain meaning of the statute provides that this

1 judgment lien is avoidable. Ms. Farrey is requesting that
2 this Court graft onto section 522(f) an exception not put
3 there by Congress, that exception being for property
4 division equalizing payment liens.

5 If such an exception is to be placed, it is to
6 be placed by Congress and not the courts. Congress, since
7 the passage of the Bankruptcy Code, has been very active
8 in modifying the code. Attempts by courts, in our
9 opinion, to find these types of liens as being
10 nonavoidable under 522 are not based upon the policy
11 determinations nor the intent of Congress, but on
12 emotionalism and a desire to bend the code to meet that
13 particular court's perception of justice.

14 Congress is charged with providing -- uniform
15 laws on bankruptcy. Congress is charged with determining
16 policy. Congress should make the determination if this
17 particular lien should not be avoided. When Congress has
18 spoken so clearly on a policy determination of avoidance
19 of what is clearly a judicial lien, it should be given its
20 fullest possible effect. The Seventh Circuit's
21 determination should be affirmed.

22 If there are no further questions, Mr. Chief
23 Justice, thank you.

24 QUESTION: Thank you, Mr. Samson.

25 Mr. Williamson, do you have rebuttal? You have

1 3 minutes remaining.

2 REBUTTAL ARGUMENT OF BRADY C. WILLIAMSON
3 ON BEHALF OF THE PETITIONER

4 MR. WILLIAMSON: Thank you, Mr. Chief Justice.
5 There is a fundamental difference of opinion in this case.
6 Jeanne Farrey is not just a creditor. She and Gerald
7 Sanderfoot shared a marriage, a home, a marital estate,
8 for 20 years. And to suggest that Congress could have
9 intended to treat someone in that position like a savings
10 and loan or household finance is to ignore reality.

11 Faced with the Seventh Circuit's decision, the
12 divorce courts of this country seeking to protect the
13 interests of spouses, men and women, will be left with few
14 if any choices. The State court could order the home sold
15 immediately, divide the cash, 50-50. Everybody walks
16 away, no liens.

17 What about the children? What if there are
18 young children? Should we -- should we promote a policy
19 that forces children out of a family home? Mr. Samson has
20 suggested for his client that the State could order the
21 title to the home held jointly. People in a divorce can't
22 agree on a marriage. How are they going to agree on who's
23 going to pay to fix the furnace? This simply would
24 perpetuate and compound the problem.

25 Finally, how does that spouse who leaves the

1 home, man or woman, come up with the equity or the cash to
2 establish her own homestead or his own homestead?

3 The respondent concedes that the result in this
4 case is -- so far at least, has been harsh. It has been
5 more than harsh. It has been unconscionable. And as
6 devastating as those consequences have been for Jeanne
7 Farrey, they will be no less devastating for the judicial
8 system of this country, Federal and State. The Chief
9 Justice has already expressed his concerns about the
10 growing number of bankruptcies, personal bankruptcies.
11 This can only compound that burden.

12 We ask again that the Court reverse --

13 QUESTION: May I ask you, do you know if there's
14 any legislation pending in Congress to clarify this mess?

15 MR. WILLIAMSON: There is none --

16 QUESTION: Because the statute really is very
17 ambiguous in this whole area. There isn't any you know
18 of?

19 MR. WILLIAMSON: I am aware of none introduced
20 at this point, Your Honor.

21 That concludes my arguments, Mr. Chief Justice.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
23 Williamson. The case is submitted.

24 (Whereupon, at 11:45 a.m., the case in the
25 above-entitled matter was submitted.)

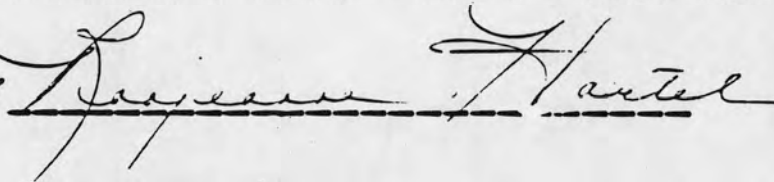
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Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#90-350 - JEANNE FARREY, fka JEANNE SANDERFOOT, Petitioner V.

GERALD J. SANDERFOOT

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

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