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## **Document (1)**

1. [\*O'Brien v. AMBS Diagnostics, LLC, 246 Cal. App. 4th 942\*](#)

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## O'Brien v. AMBS Diagnostics, LLC

Court of Appeal of California, Second Appellate District, Division Two

April 21, 2016, Opinion Filed

B263364

### Reporter

246 Cal. App. 4th 942 \*; 201 Cal. Rptr. 3d 305 \*\*; 2016 Cal. App. LEXIS 310 \*\*\*

TIMOTHY O'BRIEN, Plaintiff and Respondent, v. AMBS DIAGNOSTICS, LLC, Defendant and Appellant.

**Prior History:** [\*\*\*1] APPEAL from a postjudgment order of the Superior Court of Los Angeles County, No. GC048333, C. Edward Simpson, Judge.

significant salary in the past.

### Outcome

Ruling reversed and matter remanded.

## LexisNexis® Headnotes

[O'Brien v. AMBS Diagnostics, LLC, 2016 Cal. App. Unpub. LEXIS 63 \(Cal. App. 2d Dist., Jan. 7, 2016\)](#)

**Disposition:** Reversed and remanded.

## Core Terms

exemption, savings account, retirement, levy, retirement account, trial court, retirement plan, federal bankruptcy, expenses, judgment debtor, earning, full amount, purposes, factors

## Case Summary

### Overview

**HOLDINGS:** [1]-A trial court erred in exempting from execution a judgment debtor's 26 U.S.C. § 529 savings accounts for his children's qualified higher education expenses because such accounts are not exempt from the collection efforts under the California Enforcement of Judgments Law, Code Civ. Proc., § 680.010 et seq., of a creditor who has a valid judgment against a debtor; [2]-The court also erred in exempting the full amount of the debtor's individual retirement accounts because it did not apply the proper legal standard in evaluating Code Civ. Proc., § 704.115's exemption for private retirement accounts, given that it refused to weigh or take into consideration what the debtor's and his wife's current wages and salaries were, and the error was not harmless because the debtor was still many years from retirement, was in good health, and had earned a

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Civil Procedure > Judgments > Enforcement & Execution > Exemptions From Execution

### HN1 [↓] Standards of Review, De Novo Review

On a question that turns on a question of statutory construction, an appellate court's review is de novo. The scope of an exemption under Cal. Civ. Proc. Code § 704.115, is a question of law.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

### HN2 [↓] Standards of Review, Abuse of Discretion

On a question that is entrusted to a trial court's wide discretion, an appellate court's review is for an abuse of discretion.

Civil Procedure > Judgments > Enforcement &

Execution > Exemptions From Execution

Evidence > Burdens of Proof > Allocation

Civil Procedure > Judgments > Enforcement &  
Execution > Writs of Execution

### **HN3** **Enforcement & Execution, Exemptions From Execution**

California's Enforcement of Judgments Law, which is codified in [Code Civ. Proc., §§ 680.010 through 724.260](#), is a comprehensive and precisely detailed scheme governing enforcement of money judgments in California. As a general rule, the Law authorizes a creditor holding a money judgment to enforce that judgment against all property of the judgment debtor through a writ of execution. [Code Civ. Proc., §§ 695.010, subd. \(a\) & 699.710](#). To effectuate the California Constitution's command that a certain portion of the homestead and other property of all heads of families be protected, by law, from forced sale, [Cal. Const., art. XX, § 1.5](#), the legislature has exempted certain items of property from levy by creditors with money judgments; those exemptions are set forth in [Code Civ. Proc., §§ 704.010 through 704.210](#). The debtor bears the burden of proving that his or her property fits within one or more of these exemptions. [Code Civ. Proc., § 703.010, subd. \(a\)](#).

Business & Corporate Compliance > ... > Tax  
Law > Federal Taxpayer Groups > Exempt  
Organizations

Education Law > Administration &  
Operation > Tuition

Business & Corporate Compliance > ... > Tax  
Law > Federal Income Tax Computation > Tax  
Accounting

### **HN4** **Tax, Exempt Organizations**

[Section 529 of the Internal Revenue Code](#) creates a narrow exemption from federal income taxes for money that is earned as part of a qualified tuition program. [26 U.S.C. § 529](#). Under this exemption, an individual may contribute cash, after paying income taxes on it, into a [section 529](#) savings account; the individual may later withdraw money from that account—without having to pay any income tax on the account's earnings—if that money is used to pay the qualified higher education

expenses of a relative. [§ 529, subds. \(a\), \(b\), \(c\)\(1\), \(c\)\(3\) & \(e\)](#). If the money is used for any other purpose, the individual has to pay the income taxes on any earnings plus a 10 percent penalty. [26 U.S.C. §§ 529, subd. \(c\)\(6\) & 530, subd. \(d\)\(4\)](#).

Bankruptcy Law > Exemptions

Civil Procedure > Judgments > Enforcement &  
Execution

Business & Corporate Compliance > ... > Tax  
Law > Federal Taxpayer Groups > Exempt  
Organizations

Business & Corporate Compliance > ... > Tax  
Law > Federal Income Tax Computation > Tax  
Accounting

Bankruptcy Law > Procedural Matters

### **HN5** **Bankruptcy Law, Exemptions**

Under federal bankruptcy law, [26 U.S.C. § 529](#) savings accounts are excluded from a debtor's estate and thus cannot be used to satisfy creditors' debts. [11 U.S.C. § 541, subd. \(b\)\(6\)](#). The protection accorded to a debtor's [section 529](#) savings accounts in federal bankruptcy proceedings arises only after the debtor has initiated those proceedings by filing for bankruptcy. Because the power of federal bankruptcy law to displace state law does not extend to state laws concerning conduct that occurred prior to bankruptcy, the California Court of Appeal declines to give controlling weight to the treatment of [section 529](#) savings accounts under federal bankruptcy law when interpreting how California's collections law operates prior to bankruptcy.

Constitutional Law > Supremacy Clause > Federal  
Preemption

Governments > Legislation > Interpretation

### **HN6** **Supremacy Clause, Federal Preemption**

The maxim that state and federal laws should be accommodated and harmonized where possible is a tool for avoiding preemption.

Business & Corporate Compliance > ... > Tax  
Law > Federal Taxpayer Groups > Exempt  
Organizations

Civil Procedure > Judgments > Enforcement &  
Execution > Exemptions From Execution

Education Law > Administration &  
Operation > Tuition

Pensions & Benefits Law > Employee Benefit Plans

Business & Corporate Compliance > ... > Tax  
Law > Federal Income Tax Computation > Tax  
Accounting

### [HN7](#) **Tax, Exempt Organizations**

The exemption of the California Enforcement of Judgments Law, [Code Civ. Proc., § 680.010 et seq.](#), in [Code Civ. Proc., § 704.115](#), for private retirement accounts applies to all amounts held, controlled, or in process of distribution by a private retirement plan, for the payment of benefits as an annuity, pension, retirement allowance, disability payment, or death benefit from a private retirement plan. [§ 704.115, subd. \(b\)](#). It defines a "private retirement plan" as including, among other things, self-employed retirement plans and individual retirement annuities or accounts provided for in the Internal Revenue Code of 1986. [§ 704.115, subd. \(a\)\(3\)](#). To qualify as a private retirement plan, however, the plan must also be designed and used for retirement purposes. As defined, [26 U.S.C. § 529](#) savings accounts are designed and used for educational purposes, not retirement purposes; such accounts lose their tax exempt status and are subject to penalty if they are used for anything other than educational purposes.

Civil Procedure > Judgments > Enforcement &  
Execution > Exemptions From Execution

### [HN8](#) **Enforcement & Execution, Exemptions From Execution**

The purpose of exempting certain property from levy is to protect enough of the debtors' property from enforcement to enable them to support themselves and their families.

Business & Corporate Compliance > ... > Tax

Law > Federal Taxpayer Groups > Exempt  
Organizations

Civil Procedure > Judgments > Enforcement &  
Execution > Exemptions From Execution

Education Law > Administration &  
Operation > Tuition

Business & Corporate Compliance > ... > Tax  
Law > Federal Income Tax Computation > Tax  
Accounting

### [HN9](#) **Tax, Exempt Organizations**

California is not one of the states that has exempted [26 U.S.C. § 529](#) savings accounts from levy by creditors. Exemptions are the creatures of statutes, and no property is exempt unless made so by express provision of law. Because exemptions cannot be enlarged by the courts, the Court of Appeal cannot go one step further and create a brand new exception from whole cloth, no matter how persuasive the policy reasons that might support it.

Civil Procedure > Judgments > Enforcement &  
Execution > Exemptions From Execution

### [HN10](#) **Enforcement & Execution, Exemptions From Execution**

[Code Civ. Proc., § 704.115](#), exempts "private retirement plans" from levy. [§ 704.115, subd. \(b\)](#). However, this exemption is not an all-or-nothing affair; instead, it exempts these accounts only to the extent necessary to provide for the support of the judgment debtor when the judgment debtor retires and for the support of the spouse and dependents of the judgment debtor. [§ 704.115, subd. \(e\)](#).

Civil Procedure > Appeals > Standards of  
Review > Abuse of Discretion

Civil Procedure > Judgments > Enforcement &  
Execution > Exemptions From Execution

### [HN11](#) **Standards of Review, Abuse of Discretion**

In assessing what portion of a debtor's retirement account is necessary for the debtor's support, [Code Civ.](#)

[Proc., § 704.115](#), directs a court to take into account all resources that are likely to be available for the support of the judgment debtor when he or she retires. [§ 704.115, subd. \(e\)](#). In determining whether the amounts held in the accounts are necessary for the debtor's support when he or she retires, a court should consider various factors, including: (1) the debtor's present and anticipated living expenses and income; (2) the age and health of the debtor and his or her dependents; (3) the debtor's ability to work and earn a living; (4) the debtor's training, job skills and education; (5) the debtor's other assets and their liquidity; (6) the debtor's ability to save for retirement; and (7) any special needs of the debtor and his or her dependents. The goal, in examining these factors, is to assess the potential disruption in earning capacity from the judgment's levy and the debtor's ability to regenerate retirement funds prior to retirement. Although a trial court is not required to make express findings on each of these factors, and although an appellate court will generally imply the findings necessary to support the proper exercise of a trial court's discretion, a trial court abuses its discretion when it appears from the record it applied the wrong legal standard.

## Headnotes/Syllabus

### Summary

#### [\*942] CALIFORNIA OFFICIAL REPORTS SUMMARY

After obtaining a writ of execution for a judgment in its favor, a judgment creditor served a notice of levy upon a company that managed the judgment debtor's three savings accounts for the qualified higher education expenses of his children under [26 U.S.C. § 529 \(section 529 savings accounts\)](#) and four individual retirement accounts. The judgment debtor filed a claim of exemption. The trial court granted the judgment debtor's claims for exemption, concluding that the [section 529 savings accounts](#) were exempt from levy and that the full amount of the judgment debtor's four retirement accounts was necessary to provide for him and his family upon his retirement. (Superior Court of Los Angeles County, No. GC048333, C. Edward Simpson, Judge.)

The Court of Appeal reversed the ruling and remanded the matter. The court held that a person's [section 529 savings accounts](#) are not exempt from the collection efforts under the Enforcement of Judgments Law ([Code Civ. Proc., § 680.010 et seq.](#)) of a creditor who has a valid judgment against that person. [Section 529 savings](#)

accounts are designed and used for educational purposes, not retirement purposes; indeed, such accounts lose their tax exempt status and are subject to penalty if they are used for anything other than educational purposes. Accordingly, the trial court erred in exempting the judgment debtor's [section 529 savings accounts](#) from execution. The trial court also erred in exempting the full amount of the judgment debtor's retirement accounts because it did not apply the proper legal standard in evaluating the exemption for private retirement accounts. The trial court refused to weigh or take into consideration what the judgment debtor's and his wife's current wages and salaries were, and the error was not harmless given the evidence that the judgment debtor was still many years from retirement, was in good health, and had earned a significant salary in the past. (Opinion by Hoffstadt, J., with Ashmann-Gerst, Acting P. J., and Chavez, J., concurring.)

### Headnotes

#### CALIFORNIA OFFICIAL REPORTS HEADNOTES

#### [CA\(1\)](#) [↓] (1)

##### Judgments § 100—Enforcement—Writ of Execution—Exemptions—Burden of Proof.

The Enforcement of Judgments Law ([Code Civ. Proc., § 680.010 et seq.](#)) is a comprehensive and precisely detailed scheme governing enforcement of money judgments in California. As a general rule, the law authorizes a creditor holding a money judgment to enforce that judgment against all property of the judgment debtor through a writ of execution ([Code Civ. Proc., §§ 695.010, subd. \(a\), 699.710](#)). To effectuate the California Constitution's command that a certain portion of the homestead and other property of all heads of families be protected, by law, from forced sale ([Cal. Const., art. XX, § 1.5](#)), the Legislature has exempted certain items of property from levy by creditors with money judgments; those exemptions are set forth in [Code Civ. Proc., §§ 704.010 through 704.210](#). The debtor bears the burden of proving that his or her property fits within one or more of these exemptions ([Code Civ. Proc., § 703.010, subd. \(a\)](#)).

#### [CA\(2\)](#) [↓] (2)

##### Income Taxes § 4—Federal—Exemptions From Taxes—Qualified Tuition Programs.



[Section 529](#) of the Internal Revenue Code creates a narrow exemption from federal income taxes for money that is earned as part of a qualified tuition program ([26 U.S.C. § 529](#)). Under this exemption, an individual may contribute cash, after paying income taxes on it, into a [section 529](#) savings account; the individual may later withdraw money from that account—without having to pay any income tax on the account's earnings—if that money is used to pay the qualified higher education expenses of a relative ([26 U.S.C. § 529\(a\), \(b\), \(c\)\(1\), \(3\) & \(e\)](#)). If the money is used for any other purpose, the individual has to pay the income taxes on any earnings plus a 10 percent penalty ([26 U.S.C. §§ 529\(c\)\(6\) & 530\(d\)\(4\)](#)).

### [CA\(3\)](#) [↓] (3)

#### **Bankruptcy § 4—Exemptions—Section 529 Savings Accounts—Effect on State Collections Law.**

Under federal bankruptcy law, [26 U.S.C. § 529](#) savings accounts are excluded from a debtor's estate and thus cannot be used to satisfy creditors' debts ([11 U.S.C. § 541\(b\)\(6\)](#)). The protection accorded to a debtor's [section 529](#) savings accounts in federal bankruptcy proceedings arises only after the debtor has initiated those proceedings by filing for bankruptcy. Because the power of federal bankruptcy law to displace state law does not extend to state laws concerning conduct that occurred prior to bankruptcy, no controlling weight would be given to the treatment of [section 529](#) savings accounts under federal bankruptcy law when interpreting how California's collections law operates prior to bankruptcy.

### [CA\(4\)](#) [↓] (4)

#### **Statutes § 19—Construction—State and Federal Laws—Harmonization.**

The maxim that state and federal laws should be accommodated and harmonized where possible is a tool for avoiding preemption.

### [CA\(5\)](#) [↓] (5)

#### **Judgments § 100—Enforcement—Exemptions—Private Retirement Accounts.**

The Enforcement of Judgments Law's ([Code Civ. Proc., § 680.010 et seq.](#)) exemption, in [Code Civ. Proc., § 704.115, subd. \(b\)](#), for private retirement accounts

applies to all amounts held, controlled, or in process of distribution by a private retirement plan, for the payment of benefits as an annuity, pension, retirement allowance, disability payment, or death benefit from a private retirement plan. It defines a “private retirement plan” as including, among other things, self-employed retirement plans and individual retirement annuities or accounts provided for in the Internal Revenue Code of 1986 ([§ 704.115, subd. \(a\)\(3\)](#)). To qualify as a private retirement plan, however, the plan must also be designed and used for retirement purposes. As defined, [26 U.S.C. § 529](#) savings accounts are designed and used for educational purposes, not retirement purposes; such accounts lose their tax exempt status and are subject to penalty if they are used for anything other than educational purposes.

### [CA\(6\)](#) [↓] (6)

#### **Judgments § 100—Enforcement—Exemptions.**

The purpose of exempting certain property from levy is to protect enough of the debtors' property from enforcement to enable them to support themselves and their families.

### [CA\(7\)](#) [↓] (7)

#### **Judgments § 100—Enforcement—Exemptions—Section 529 Savings Accounts.**

California is not one of the states that has exempted [26 U.S.C. § 529](#) savings accounts from levy by creditors. Exemptions are the creatures of statutes, and no property is exempt unless made so by express provision of law. Because exemptions cannot be enlarged by the courts, the courts cannot go one step further and create a brand-new exception from whole cloth, no matter how persuasive the policy reasons that might support it.

### [CA\(8\)](#) [↓] (8)

#### **Judgments § 100—Enforcement—Exemptions—Section 529 Savings Accounts.**

The trial court erred in exempting a judgment debtor's [26 U.S.C. § 529](#) savings accounts from execution, as they were not exempt from levy under the Enforcement of Judgments Law ([Code Civ. Proc., § 680.010 et seq.](#)).

[[Cal. Forms of Pleading and Practice \(2016\) ch. 254](#),

[Executions and Enforcement of Judgments, § 254.371; 2 Goldsmith et al., Matthew Bender Practice Guide: Cal. Debt Collection and Enforcement of Judgments \(2015\) § 16.33; 8 Witkin, Cal. Procedure \(5th ed. 2008\) Enforcement of Judgment, §§ 204, 214.\]](#)

## [CA\(9\)](#) [↓] (9)

### Judgments § 100—Enforcement—Exemptions—Private Retirement Plans.

[Code Civ. Proc., § 704.115, subd. \(b\)](#), exempts private retirement plans from levy. However, this exemption is not an all-or-nothing affair; instead, it exempts these accounts only to the extent necessary to provide for the support of the judgment debtor when the judgment debtor retires and for the support of the spouse and dependents of the judgment debtor ([§ 704.115, subd. \(e\)](#)).

## [CA\(10\)](#) [↓] (10)

### Judgments § 100—Enforcement—Exemptions—Private Retirement Plans—Amounts Necessary for Debtor's Support—Factors.

In assessing what portion of a debtor's retirement account is necessary for the debtor's support, [Code Civ. Proc., § 704.115](#), directs a court to take into account all resources that are likely to be available for the support of the judgment debtor when the judgment debtor retires ([§ 704.115, subd. \(e\)](#)). In determining whether the amounts held in the accounts are necessary for the debtor's support when he or she retires, a court should consider various factors, including (1) the debtor's present and anticipated living expenses and income; (2) the age and health of the debtor and his or her dependents; (3) the debtor's ability to work and earn a living; (4) the debtor's training, job skills, and education; (5) the debtor's other assets and their liquidity; (6) the debtor's ability to save for retirement; and (7) any special needs of the debtor and his or her dependents. The goal, in examining these factors, is to assess the potential disruption in earning capacity from the judgment's levy and the debtor's ability to regenerate retirement funds prior to retirement. A trial court is not required to make express findings on each of these factors.

**Counsel:** Miller, Monson, Peshel, Polacek & Hoshaw, Thomas M. Monson; Butterfield Schechter, Marc S.

Schechter and Paul D. Woodard for Defendant and Appellant.

Woolf & Nachimson and Benjamin S. Nachimson for Plaintiff and Respondent.

**Judges:** Opinion by Hoffstadt, J., with Ashmann-Gerst, Acting P. J., and Chavez, J., concurring.

**Opinion by:** Hoffstadt, J.

## Opinion

[\*\*307] **HOFFSTADT, J.**—Is money that a person sets aside for the “qualified higher education expenses” of his children under [Internal Revenue Code section 529](#) (so-called [section 529](#) savings accounts) exempt from the collection efforts under the Enforcement of Judgments Law, [Code of Civil Procedure section \[\\*946\] 680.010 et seq.](#),<sup>1</sup> of a creditor who has a valid judgment against that person? We conclude it is not. Accordingly, we reverse the trial court's ruling to the contrary, and also reverse its finding that the debtor's retirement accounts are fully exempt from collection because the court did not apply the proper legal standard in evaluating the exemption for private retirement accounts.

## FACTS AND PROCEDURAL BACKGROUND

Following a bench [\*\*\*2] trial in 2014, AMBS Diagnostics, LLC (Diagnostics), obtained a judgment against Timothy O'Brien (O'Brien) in the amount of \$622,957.21.<sup>2</sup>

[\*\*308] A few months later, Diagnostics recorded an abstract of judgment and the trial court issued a writ of execution for that judgment. Diagnostics served a notice of levy upon FMR, LLC/Fidelity Investments, which managed at least seven of O'Brien's investment accounts.

O'Brien thereafter filed a claim of exemption seeking a judicial declaration that seven of his Fidelity Investments

<sup>1</sup> Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

<sup>2</sup> We affirmed this portion of the judgment in an unpublished opinion. (See *O'Brien v. AMBS Diagnostics, LLC* (Jan. 7, 2016, B260301).)

accounts were exempt from levy: (1) three [section 529](#) savings accounts held in his name, then valued at \$54,765.39, one for each of his three children; and (2) four individual retirement accounts held fully or partially in his name, then valued at \$465,350.04. For all seven accounts, O'Brien invoked the exemption for "individual retirement ... accounts" set forth in [section 704.115](#). In support of his claim, O'Brien submitted evidence that he was 51 and his wife was 41, that he was caring for his three children and two members of his extended family, that his monthly income [\*\*\*3] of \$8,841.30 was overshadowed by his monthly expenses of anywhere from \$17,632 to \$20,000-plus, and that he possessed no "other substantial assets to rely upon for ... retirement." In prior depositions, O'Brien had indicated that his new company in 2014 was generating an average monthly income of \$20,000 and that one of his extended relatives was contributing \$1,000 per month toward the household's expenses; neither was reflected in O'Brien's exemption request.

Diagnostics objected. Following further briefing, the trial court held a hearing and thereafter granted O'Brien's claims for exemption for all of the [section 529](#) savings accounts and for the full amount of all four retirement accounts. With respect to the [section 529](#) savings accounts, the court noted the absence of any "statutory or case authority" as to whether [section 529](#) [\*947] savings accounts are exempt from levy, but reasoned that "the same public policy applies to both the private retirement plans and the [529](#) plans," further noting that "protecting monies held in trust for the education of one[']s children may even be a greater reason to exempt them from execution." With respect to the individual retirement accounts, the court stated its view during the [\*\*\*4] hearing that it could not "weigh or take into consideration what [O'Brien's and his wife's] current wages and salaries are." In its subsequent written order, the court concluded that exempting the full amount of the retirement accounts was necessary because O'Brien was "self employed" and, upon his retirement, "will have only the net after tax income from his private retirement plans and whatever social security income he and his wife might receive."

Diagnostics timely appealed this ruling.

## DISCUSSION

Diagnostics argues that the trial court erred in (1) concluding that the [section 529](#) savings accounts were exempt from levy, and (2) concluding that the full

amount of O'Brien's four retirement accounts was "necessary to provide for" him and his family upon his retirement. The first [HN1](#) question turns on a question of statutory construction, so our review is de novo. (*In re Lieberman* (9th Cir. 2001) 245 F.3d 1090, 1091 ["[t]he scope of an exemption under [Cal. Civ. Proc. Code § 704.115](#) is a question of law"].) [HN2](#) The second is entrusted to a trial court's "wide discretion," so our review is for an abuse of discretion. (*In re Spenler* (Bankr. 9th Cir. 1997) 212 B.R. 625, 631.)

### I. Whether [Section 529](#) Savings Accounts Are Exempt from Levy Under California's Enforcement of Judgments Law

[HN3](#) [CA\(1\)](#) (1) California's Enforcement of Judgments Law (Law), which is codified [\*\*\*5] in [sections 680.010 through 724.260](#), [\*\*\*309] is a "comprehensive and precisely detailed scheme" governing enforcement of money judgments" in California. (*Kono v. Meeker* (2011) 196 Cal.App.4th 81, 86 [126 Cal. Rptr. 3d 208] (Kono).) As a general rule, the Law authorizes a creditor holding a "money judgment" to "enforce" that judgment against "all property of the judgment debtor" through a "writ of execution." (§§ 695.010, subd. (a), 699.710.) To effectuate the California Constitution's command that "a certain portion of the homestead and other property of all heads of families" be "protect[ed], by law, from forced sale" (*Cal. Const., art. XX, § 1.5*), our Legislature exempted certain items of property from levy by creditors with money judgments; those [\*\*\*948] exemptions are set forth in [sections 704.010 through 704.210](#). (*Kono, at p. 86*; *Ford Motor Credit Co. v. Waters* (2008) 166 Cal.App.4th Supp. 1, 8 [83 Cal. Rptr. 3d 826] (*Ford Motor Credit Co.*).) The debtor bears the burden of proving that his property fits within one or more of these exemptions. (§ 703.010, subd. (a); *Schwartzman v. Wilshinsky* (1996) 50 Cal.App.4th 619, 626 [57 Cal. Rptr. 2d 790] (*Schwartzman*).)

[HN4](#) [CA\(2\)](#) (2) [Section 529 of the Internal Revenue Code](#) creates a narrow exemption from federal income taxes for money that is earned as part of a "qualified tuition program." (26 U.S.C. § 529.) Under this exemption, an individual may contribute cash, after paying income taxes on it, into a [section 529](#) savings account; the individual may later withdraw money from that account—without having to pay any income tax on the account's earnings—if that money is used to pay the "qualified higher education expenses" [\*\*\*6] of a relative. (§ 529(a), (b), (c)(1), (3) & (e).) If the money is used for any other purpose, the individual has to pay the



income taxes on any earnings *plus* a 10 percent penalty. (§§ 529(c)(6), 530(d)(4).)

Do [section 529](#) savings accounts fit within any of the Law's exemptions from levy? At first blush, the answer appears to be no because none of the Law's exemptions expressly refer to [section 529](#) savings accounts or other moneys set aside for education. (See §§ 704.010–704.210.)

**CA(3)** (3) O'Brien offers three reasons why a [section 529](#) savings account should nevertheless be immune from levy. First, O'Brien contends that we should look to federal bankruptcy law. **HN5** Under that law, [section 529](#) savings accounts are excluded from a debtor's estate and thus cannot be used to satisfy creditors' debts. (11 U.S.C. § 541(b)(6).) This is true, but it is also irrelevant. The protection accorded to a debtor's [section 529](#) savings accounts in federal bankruptcy proceedings arises only after the debtor has initiated those proceedings by filing for bankruptcy. (See *In re Moses* (9th Cir. 1999) 167 F.3d 470, 473 “[t]he act of filing a petition under the Bankruptcy Code commences bankruptcy proceedings and creates an estate”; 11 U.S.C. § 541(a) “[t]he commencement of a [bankruptcy] case ... creates an estate”.) O'Brien never filed for bankruptcy. Because the power of federal bankruptcy law to displace state **\*\*\*7** law does not extend to state laws “concern[ing] conduct that occurred *prior* to bankruptcy” (*Davis v. Yageo Corp.* (9th Cir. 2007) 481 F.3d 661, 678; cf. *PG&E Co. v. California ex rel. California Dept. of Toxic Substances Control* (9th Cir. 2003) 350 F.3d 932, 943 [discussing preemptive power once federal bankruptcy jurisdiction has been invoked]), we decline to give controlling weight to the treatment of [section 529](#) savings accounts under federal bankruptcy law when interpreting how **\*949** our state's collections law operates prior to bankruptcy. **CA(4)** (4) O'Brien also cites **HN6** the maxim that “[s]tate **\*\*\*310** and federal laws should be accommodated and harmonized where possible” (*California Arco Distributors, Inc. v. Atlantic Richfield Co.* (1984) 158 Cal.App.3d 349, 359 [204 Cal. Rptr. 743]; see *Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 93 [160 Cal.Rptr. 733, 603 P.2d 1329]), but this maxim is a tool for “avoid[ing]” preemption (*California Arco Distributors, at p. 359*), which, as noted above, is of no concern here.

**CA(5)** (5) Second, O'Brien asserts that the Law's exemption, in [section 704.115](#), for “private retirement accounts” encompasses [section 529](#) savings accounts. **HN7** This exemption applies to “[a]ll amounts held,

controlled, or in process of distribution by a private retirement plan, for the payment of benefits as an annuity, pension, retirement allowance, disability payment, or death benefit from a private retirement plan.” (§ 704.115, *subd. (b)*.) It defines a “private retirement plan” as including, among other things and as relevant here, “[s]elf-employed retirement plans and individual retirement annuities or accounts provided for in the Internal Revenue Code of 1986 ... .” (*Id.*, *subd. (a)(3)*.) To qualify **\*\*\*8** as a “private retirement plan,” however, the plan must also be “designed and used for retirement purposes.” (*Schwartzman, supra*, 50 Cal.App.4th at p. 628; *Yaesu Electronics Corp. v. Tamura* (1994) 28 Cal.App.4th 8, 14 [33 Cal. Rptr. 2d 283] [“the fundamental inquiry” under § 704.115 is “whether the plan was designed and used for a retirement purpose”].) As defined, [section 529](#) savings accounts are designed and used for educational purposes, not retirement purposes; indeed, such accounts lose their tax exempt status and are subject to penalty if they are used for anything other than educational purposes.

**CA(6)** (6) Lastly, O'Brien contends—and the trial court agreed—that there are good policy reasons to exempt [section 529](#) savings accounts from levy. **HN8** The purpose of exempting certain property from levy is “to protect enough of the debtors' property from enforcement to enable them to support themselves *and their families*.” (*Kono, supra*, 196 Cal.App.4th at p. 86, italics added; see *Ford Motor Credit Co., supra*, 166 Cal.App.4th at p. Supp. 8 [exemptions exist “for the protection of the debtor and the debtor's family”].) The money a debtor has set aside for his children's higher education would seem to fall comfortably within this rationale. Exempting [section 529](#) savings accounts from levy prior to bankruptcy could also be viewed as more consistent with the policy underlying federal bankruptcy law; after all, if creditors can deplete those accounts by levying on them **\*\*\*9** prior to bankruptcy, the protection accorded to them in a subsequent bankruptcy proceeding is too little, too late. Indeed, this may be why at least 27 states have exempted [section 529](#) savings **\*950** accounts from levy by creditors.<sup>3</sup> **CA(7)**

<sup>3</sup> (See *Alaska Stat. § 14.40.802*; *Ark. Code Ann. § 6-84-110, subd. (b)(2)*; *Colo. Rev. Stat. § 23-3.1-307.4*; *Fla. Stat. § 222.22*; *Idaho Code § 11-604A*; *Kan. Stat. Ann. § 60-2308, subd. (f)(2)–(4)*; *Ky. Rev. Stat. § 164A.350*; *La. Rev. Stat. § 17-3096G*; *Me. Rev. Stat. Ann., tit. 20-A, § 11478*; *Md. Educ. Code Ann. § 18-1913*; *Neb. Rev. Stat. § 85-1809*; *Nev. Rev. Stat. § 21.090*; *N.J. Stat. § 18A:71B-41.1*; *N.Y. CLS CPLR §*

↑] (7) However, [HN9](#)↑] California is not one of those states. “Exemptions [\*\*\*311] are the creatures of statutes” and “[n]o property is exempt unless made so by express provision of law.” ([Estate of Brown \(1889\) 123 Cal. 399, 401 \[55 P. 1055\]](#).) Because exemptions “cannot be enlarged by the courts” ([Vineyard v. Sisson \(1990\) 223 Cal.App.3d 931, 938 \[272 Cal.Rptr. 914\]](#)), we certainly cannot go one step further and create a brand-new exception from whole cloth, no matter how persuasive the policy reasons that might support it. We leave that task where our Constitution put it—with our Legislature.

[CA\(8\)](#)↑] (8) For all these reasons, the trial court erred in exempting O'Brien's [section 529](#) savings accounts from execution.

#### II. Whether the Trial Court Abused Its Discretion in Exempting the Full Amount of O'Brien's Retirement Accounts

[CA\(9\)](#)↑] (9) As noted above, [HN10](#)↑] [section 704.115](#) exempts “private retirement plans” from levy. (§ [704.115, subd. \(b\)](#).) However, this exemption is not an all-or-nothing affair; instead, it exempts these accounts “only to the extent necessary to provide [\*\*\*10] for the support of the judgment debtor when the judgment debtor retires and for the support of the spouse and dependents of the judgment debtor.” (*Id.*, [subd. \(e\)](#); see [Schwartzman, supra, 50 Cal.App.4th at pp. 629–630](#) [so noting].)

[HN11](#)↑] [CA\(10\)](#)↑] (10) In assessing what portion of a debtor's retirement account is “necessary” for the debtor's support, the statute directs a court to “tak[e] into account all resources that are likely to be available for the support of the judgment debtor when the judgment debtor retires.” (§ [704.115, subd. \(e\)](#)) “In determining whether the amounts held in the accounts are necessary for [the] debtor's support when she retires, [a] court should consider various factors, including [¶] [(1)] ‘the debtor's present and anticipated living expenses and income; [(2)] the age and health of the debtor and his or her dependents; [(3)] the debtor's ability to work and earn a living; [(4)] the debtor's training, job [\*\*\*951] skills and education; [(5)] the debtor's other assets and

their liquidity; [(6)] the debtor's ability to save for retirement; and [(7)] any special needs of the debtor and his or her dependents.” ([In re Davis \(B.A.P. 9th Cir. 2005\) 323 B.R. 732, 735–736](#), quoting [In re Moffat \(B.A.P. 9th Cir. 1990\) 119 B.R. 201, 206](#), *affd.* (1991) 959 F.2d 740.) The goal, in examining these factors, is to assess the “potential disruption in earning capacity” from the judgment's levy and “the [d]ebtor's ability to regenerate [\*\*\*11] retirement funds” prior to retirement. ([In re Switzer \(Bankr. C.D.Cal. 1992\) 146 B.R. 1, 5](#).)

Although a trial court is not required to make express findings on each of these factors (e.g., [Bauer v. Bauer \(1996\) 46 Cal.App.4th 1106, 1118 \[54 Cal. Rptr. 2d 377\]](#) [express findings on controverted facts not generally required]) and although an appellate court will generally imply the findings necessary to support the proper exercise of a trial court's discretion ([Acacia Patent Acquisition, LLC v. Superior Court \(2015\) 234 Cal.App.4th 1091, 1096–1097 \[184 Cal. Rptr. 3d 583\]](#)), a trial court abuses its discretion when it appears from the record that it “applie[d] the wrong legal standard” ([Costco Wholesale Corp. v. Superior Court \(2009\) 47 Cal.4th 725, 733 \[101 Cal. Rptr. 3d 758, 219 P.3d 736\]](#)).

Here, the trial court applied the wrong standard. The court refused to “weigh or take into consideration what [O'Brien's and his wife's] current wages and salaries are,” but those are facts that the case law dictates must be considered in assessing O'Brien's ability to replenish his retirement account prior to his retirement. [\*\*\*312] This error is also not harmless given the evidence that O'Brien is still many years from retirement, is in good health, and has earned a significant salary in the past. (Accord, [In re Montavon \(Bankr. Minn. 1985\) 52 B.R. 99, 103](#) [applying similar factors and not exempting a retirement account under federal bankruptcy law in case involving “a relatively young debtor with good health, substantial earning capacity, and current ability to meet his and his dependents' regular [\*\*\*12] living expenses”].)

We are accordingly compelled to reverse the trial court's ruling declaring the full amount of O'Brien's four retirement accounts to be exempt and to remand for the court to apply all of the relevant factors in deciding what portion of those accounts is necessary for the support of O'Brien and his dependents. In light of this conclusion, we have no occasion to consider Diagnostics's further arguments that O'Brien did not provide documents to corroborate his monthly household expenses and did not spell out with specificity his likely earnings prior to retirement as well as his financial needs upon

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[5205; N.D. Admin. Code § 12.5-02-01-06; Ohio Rev. Code Ann. § 3334.15, subd. \(a\); 31 Okl. Stat. § 1.A.24; Ore. Rev. Stat. § 348.863, subd. \(2\); 24 Pa. Stat. § 6901.309.2; R.I. Gen. Laws § 9-26-4, subd. \(15\); S.C. Code Ann. § 59-2-140; S.D. Codified Laws § 13-63-20; Tenn. Code Ann. § 49-7-822; Tex. Prop. Code § 42.0022; Va. Code Ann. § 23-38.81; W. Va. Code § 18-30-7, subd. \(i\); Wis. Stat. § 16.64.\)](#)

retirement. These issues can be considered by the trial court in the first instance upon remand.

**[\*952]**

## **DISPOSITION**

We reverse and remand for further proceedings. Diagnostics is entitled to costs on appeal.

Ashmann-Gerst, Acting P. J., and Chavez, J., concurred.

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