

THIS OPINION IS NOT INTENDED FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:) CASE NO. 01-54142
)
MICHAEL KELLY,) CHAPTER 7
)
DEBTOR(S)) JUDGE MARILYN SHEA-STONUM
)
) **ORDER SUSTAINING CHAPTER 7**
) **TRUSTEE'S OBJECTION TO**
) **DEBTOR'S CLAIMED**
) **EXEMPTION AND REQUIRING**
) **TURNOVER OF PROPERTY**

On October 19, 2001, Michael Kelly initiated this case by filing a voluntary chapter 7 proceeding. On Schedule D - Property Claimed as Exempt debtor listed, *inter alia*, a life insurance policy with The Lincoln National Life Insurance Company (the "Policy"). Debtor claimed an exemption in the Policy pursuant to Ohio Revised Code ("O.R.C.") §§2329.66(A)(6)(b), 3911.10, 3911.12 and 3911.14.

On January 24, 2002, the chapter 7 trustee filed an objection to debtor's claimed exemption in the Policy [docket #5] and a hearing on the matter was scheduled for February 27, 2002.¹ Prior to that hearing, the chapter 7 trustee contacted the Court to indicate that the matter had been resolved. Accordingly, the hearing was not held.

The parties' resolution of the matter apparently fell through because on July 18, 2002,

¹ The §341 first meeting of creditors in this matter had been adjourned from December 14, 2001 to January 8, 2002 so pursuant to FED. R. BANKR. P 4003(b), such objection was timely.

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the chapter 7 trustee and counsel for debtor submitted to the Court a proposed “Agreed Order Re: Statement of Fact and Briefs” through which they agreed to submit dispositive motions regarding the chapter 7 trustee’s objection to debtor’s claimed exemption in the Policy. The Court signed and entered that proposed stipulation [docket #10] and the parties’ pleadings were due by not later than August 15, 2002. On August 14, 2002, the parties filed a motion seeking an extension of time in which to file their dispositive pleadings. That motion was granted and that filing date was extended to September 2, 2002. [Docket #19].

On August 30, 2002, “Agreed Stipulations of Fact” were filed. [Docket #13]. Also on August 30, 2002 the chapter 7 trustee filed a memorandum in support of his objection. [Docket #14]. Debtor has never filed a pleading in response to the chapter 7 trustee’s objection to his claimed exemption in the Policy.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is determined to be a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (B) over which this Court has jurisdiction pursuant to 28 U.S.C. §§1334(b), 157(a) and 157(b). Based upon the above referenced pleadings, the Court makes the following conclusions of law.

BACKGROUND FACTS

Pursuant to their “Agreed Stipulations of Fact,” the parties set forth, in pertinent part, the following:

The Debtor is a married man, age fifty-four (54). The Debtor is gainfully employed at American Express Financial Advisors, Akron, Ohio. The Debtor’s gross income at the time of filing of the bankruptcy was \$1,144.00

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per month. The Debtor had assets totaling \$5,945.00, one of which was a Lincoln National Life Insurance Policy on his ex-wife's life (Barbara Kelly). The Debtor is the owner and beneficiary of the policy. The Debtor does not support his ex-wife. The Debtor is married to Fay A. Kelly. The Debtor listed debts of \$2,815,835.36. These debts were primarily business debts resulting from a failed business venture. . . . The face amount of the [life insurance] policy was \$10,000.00. The Debtor has claimed the policy exempt . . . in the amount of \$4,153.03.

Agreed Stip. of Fact [docket #13].²

DISCUSSION

Debtor is required to file a list of the property that he is claiming to be exempt pursuant to §522 of the Bankruptcy Code. FED. R. BANKR. P. 4003(a). Once that list is filed, a party in interest may file an objection and the objecting party bears the burden of proving that an exemption is not properly claimed. FED. R. BANKR. P. 4003(b) and (c). Through his objection, the chapter 7 trustee contends that debtor's claimed exemption in the Policy is not properly claimed pursuant to the provisions of the Ohio Revised Code referenced by debtor.

Those code provisions set forth, in pertinent part, as follows:

O.R.C. §2329.66(A)(6)(b) - Exempted interests and rights.

(A) Every person who is domiciled in this state may hold property exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order, as follows:

* * *

² Despite the reference to only \$5,945.00 in assets, debtor actually listed total assets of \$97,145.00 on his Schedule B - Personal Property. Also, despite the characterization of the bulk of debtor's debt as related to a failed business, debtor indicated on the first page of his petition that the nature of his debts were "Consumer / Non-Business."

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(6)(b) The person's interest in contracts of life or endowment insurance or annuities, as exempted by section 3911.10 of the Revised Code.

O.R.C. §3911.10 - Proceeds exempt from claims of creditors.

All contracts of life or endowment insurance or annuities upon the life of any person, or any interest therein, which may hereafter mature and *which have been taken out for the benefit of*, or made payable by change of beneficiary, transfer, or assignment to, *the spouse or children, or any persons dependent upon such person, . . .* or any creditor, or to a trustee for the benefit of such spouse, children, dependent persons, institution or entity, or creditor, *shall be held*, together with the proceeds or avails of such contracts, subject to a change of beneficiary if desired, *free from all claims of creditors of such insured person* or annuitant.

[Emphasis added].

O.R.C. §3911.12 - Policy assigned to a married person.

A policy of insurance on the life of any person, or any interest therein, assigned transferred, or made payable to a married person, or to any person, firm or corporation in trust for such married person or for such married person's benefit, whether such transfer is made by the spouse of such married person, shall inure to the benefit of such married person independently of the spouse of such married person or the creditors of the spouse, or of the person effecting or transferring the policy of such person's creditors.

O.R.C. §3911.14 - Proceeds of policy.

Any life insurance company, organized or licensed to do business under the laws of this state, may hold the proceeds of any life or endowment insurance or annuity contract issued by it upon such terms and restrictions as to revocation by the insured and control by beneficiaries, with such exemptions from legal process and the claims of creditors of beneficiaries other than the insured, and upon such other terms and conditions, irrespective of the time and manner of payment of said proceeds, as have been agreed to in writing by such company and the insured or beneficiary. . . . This section does not impair or affect the rights of creditors under section 3911.10 of the Revised Code.

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Pursuant to the language of O.R.C. §2326.66(A)(6)(b) and §3911.10, a life insurance policy is exempt from claims of creditors if such policy has been taken out for the benefit of the spouse, the children or any other person dependent upon the insured. Thus, a life insurance policy is exempt from claims of creditors *only* if held by a debtor for the benefit of third persons who fall within a class named by the statute. *Baxter v. Old Nat'l City Bank*, 189 N.E. 514, 516 (Ohio Ct. App. 1933) (construing §9394 of the General Code of Ohio which was eventually replaced by the statute at issue herein).³

In the case at bar, debtor is both the owner and sole beneficiary of the Policy so he holds it for his gain alone. Although the Policy may have been for the benefit of debtor as a spouse when it was originally taken out, the undisputed facts in this case are that debtor is no longer married to the named insured. When such circumstances change, the right to an exemption is extinguished:

Certainly, in the case at bar, the reason for the exemption has ceased. There is no longer any family to protect. The marriage had been terminated by the divorce. The wife was the beneficiary at the time. The exemption was based on that fact. She has ceased to be the wife of the insured. To hold this property to be exempt would result in favoring an unmarried man over his

³ The text of §9394 of the General Code of Ohio is as follows:

All policies of life insurance upon the life of any person, which may hereafter mature, and which have been or shall be taken out for the benefit of, or bona fide assigned to the wife or children, or any relative dependent upon such person, or any creditor, shall be held subject to a change of beneficiary if desired, for the benefit of such wife or children, or other relative or creditor, free and clear from all claims of the creditors of such insured person; and the proceeds or avails of all such life insurance shall be exempt from all liabilities from any debt, or debts, of such insured person.

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creditors. Such was not the purpose of the law. . . .

[This statute] must be construed in the light of its purpose, which it to protect the wife, a child or children, or other relatives, or a creditor named as beneficiary, and that when conditions have changed, so that the allowance of an exemption would protect none, and would defeat a creditor, the right ceases to exist.

Hoffman v. Weiland, 29 N.E.2d 33, 35 (Ohio Ct. App. 1940) (construing §9394 of the General Code of Ohio). *See also In re Weick*, 2 F.2d 647, 649 (6th Cir. 1924). Because debtor does not fall within a class of persons protected by §3911.10, that Revised Code provision does not allow him to properly claim an exemption in the Policy.

Section 3911.12 of the Ohio Revised Code also would not allow debtor to properly claim an exemption in the Policy because that provision, by its very terms, applies only to married persons. Because the life insurance policy under which debtor is a beneficiary is on the life of his ex-wife, this section does not apply. Section 3911.14 of the Ohio Revised Code also would not, on its own, allow debtor to properly claim an exemption in the Policy. That provision is specifically made subject to the rights of creditors under O.R.C. §3911.10 and, as noted above, O.R.C. §3911.10 would not preclude creditors from looking to the Policy for repayment.

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CONCLUSION

Based upon the foregoing the Court finds that the chapter 7 trustee has sustained his burden of proving that debtor's exemption in the Policy was not properly claimed.

THEREFORE, IT IS HEREBY ORDERED:

1. That the chapter 7 trustee's objection is sustained; and
2. That debtor shall turn the Policy over to the chapter 7 trustee for administration in this case.

MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 9/30/02