IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
Eastern Division

IN RE:	**IN PROCEEDINGS UNDER CHAPTER 13**
JAMES AND JULIE CALLAHAN,	**CASE NO.: 04-19698**
Debtors.	**JUDGE RANDOLPH BAXTER**

MEMORANDUM OF OPINION AND ORDER

In this contested matter, the Chapter 7 Trustee ("Trustee") objects to James and Julie Callahan's (Debtors) claim of exemption in a certain 403(b) plan [26 U.S.C. § 403(b)] ("the Plan"). The Debtors oppose the objection. The Court acquires core matter jurisdiction over the instant matter pursuant to 28 U.S.C. §§ 157(a) and (b), 28 U.S.C. § 1334, and General Order Number 84 of this district. Following a duly-noticed hearing, the following factual findings and conclusions of law are made:

The Debtors' filed for relief under Chapter 7 of the Bankruptcy Code on July 29, 2004. They scheduled their Plan in the amount of $13,414.96 on Schedule C as exempt property. On September 29, 2004, the Trustee timely filed an objection to the Debtors' exemption of the Plan. The Trustee objects on the grounds that the Plan is included in the debtors' bankruptcy estate under 11 U.S.C. § 541(a)(1) and is not subject to a valid exemption under Ohio law. Debtors oppose the relief sought by the Trustee contending that the 403(b) plan is excluded from their bankruptcy estate under § 542(c)(2) of the Bankruptcy Code and the Supreme Court's ruling in *Patterson v. Shumate. See*, 504 U.S. 753, 112 S.Ct. 2242, 119 L.Ed.2d. 519 (1992). They contend, alternatively, that if the Court determines that their Plan is property of their estate, it is exempt under Ohio Revised Code 2329.66(A)(17).

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The Court must determine whether the Debtors' Plan is property of the estate under 11 U.S.C. § 541(a), and if so, whether the Plan is exempt under applicable nonbankruptcy law.

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The Trustee objects to the Debtors' claim of exemption in their Plan on the grounds that the Plan is property of the bankruptcy estate pursuant to § 541(a) of the Bankruptcy Code. He further contends that the Plan is not a "trust" and, is therefore not excluded from the bankruptcy estate under the exceptional language in 11 U.S.C. § 541(c)(2). The Trustee cites the Sixth Circuit BAP's *In re Adams* opinion which determined, in pertinent part, that a debtor's 403(b) plan was included as estate property because it was not a "trust" as contemplated by § 541(c)(2). *In re Adams*, 302 B.R. 535 (B.A.P. 6th Cir. 2003). Herein, the Trustee acknowledges that the Court in *Adams* did not reach the issue whether an exemption was available for the *Adams'* debtors after determining that the 403(b) plan was included in the estate.[1] The Trustee acknowledges that the subject plan in the present case does contain an anti-alienation provision and that it is ERISA qualified.[2] (*See* Trustee's Memorandum-in-support and Joint Stipulations). The Trustee argues that the Plan, however, does not create a spendthrift trust as required by the

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[1]The case was remanded to the bankruptcy court for further adjudication.

[2] For a plan to be ERISA-qualified it must: (1) be a tax qualified plan under the Internal Revenue Code § 401(a); (2) be subject to ERISA; and (3) have an anti-alienation provision as required by ERISA 29 U.S.C. § 1056(d)(1). *Hall*, 151 B.R. at 419. In accord *In re Foy*, 164 B.R. 595 (Bankr. S.D. Ohio 1994). The Supreme Court in *Patterson* held that ERISA qualifies as "applicable nonbankruptcy law" for § 541(c)(2) purposes.

language of § 541(c)(2) to be excluded from the estate. He further contends that the Plan is not exempt pursuant to Ohio Revised Code § 2329.66(A)(17).

The Debtors contend that the Plan is excluded from the property of the estate pursuant to § 541(c)(2) of the Code. Debtors urge this Court to decline to follow the BAP's *Adams* decision, and follow the Supreme Court's *Patterson v. Shumate* decision. Debtors maintain that the *Adams*' decision contradicts *Patterson* in that the Supreme Court excluded all ERISA-qualified plans, even though the Supreme Court did not address 403(b) plans specifically.

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An estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case" subsequent to the filing of a case under the Bankruptcy Code. 11 U.S.C. § 541(a)(1). While the scope of this provision is broad, an exception to this inclusion requirement is found in 11 U.S.C. § 541(c)(2) which provides that "a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title". 11 U.S.C. § 541(c)(2).

In *Patterson v. Shumate,* the Supreme Court held that the anti-alienation clause contained in a pension plan, subject to the provisions of ERISA, is within the scope of 11 U.S.C. § 541(c)(2). The Court opined:

> The antialienation provision required for ERISA qualification and contained in the Plan at issue in this case thus constitutes an enforceable transfer restriction for purposes of § 541(c)(2)'s exclusion of property from the bankruptcy estate.

Patterson, 504 U.S. at 760, 112 S.Ct. at 2248. Thusly, the Court determined that funds contained in such plans are, therefore, excludable from the bankruptcy estate.

The Supreme Court in *Patterson,* whether intentionally or inadvertently, expanded the scope of § 541(c)(2) to include *plans*, as well as trusts. In *Patterson,* the Supreme Court first opined that it must enforce § 542(c)(2) according to its terms. Next, it determined, however, "the natural reading of the provision entitles a debtor to exclude from property of the estate any interest in a *plan* or trust..." *Id*. at 504 U.S. at 758.

The *Patterson* majority relied on the inclusion of "plans" as part of the literal language of § 541(c)(2). Notwithstanding *Patterson,* the Sixth Circuit noted in *Wilcox* that the circuits are in disagreement as to whether the mere presence of anti-alienation language in a plan or trust document is adequate to be enforceable under "applicable nonbankruptcy law" for purposes of the § 541(c)(2) exclusion of property from the debtor's bankruptcy estate. *See, In re Wilcox*, 233 F.3d 899 (6th Cir. 2001). The Sixth Circuit in *Wilcox* further determined that an inquiry under § 541(c)(2) normally has three parts: First, does the debtor have a beneficial interest in a trust. Second, is there a restriction on the transfer of that interest. Third, is the restriction enforceable under nonbankruptcy law. *Id*. Herein, it is unrefuted that the Plan does not contain a trust.

Seemingly, a broad reading of section 541(c)(2) to include ERISA qualified plans places one at odds with one objective of the Bankruptcy Code: to enlarge the estate to the maximum extent allowed, and the Supreme Court's rationale for treatment of retirement plans. *See In re Swanson*, 873 F.2d 1121, 1124 (8th Cir. 1989). The Supreme Court opined that, "if a worker has been promised a defined pension benefit upon retirement– and if he has fulfilled whatever conditions are required to obtain a vested benefit– he should actually receive it." *Patterson,* 504 U.S. at 764-765, 112 S.Ct. at 2250.

In this matter, the Debtors' ERISA qualified 403(b) Plan contains an anti-alienation

provision and, ostensibly "may be excluded from the estate" pursuant to *Patterson*. *Patterson,* 504 U.S.C. at 765.

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The policy rationale for the ERISA statute is enlightening. An employer's pension plan is oftentimes developed in compliance with the requirements of the Employment Retirement Income Security Act (ERISA). The principal objective of ERISA is to:

> [P]rovide a uniform and systematic framework for regulation of employee benefit plans...Congress sought to establish minimum standards to assure 'the equitable character of such plans and their financial soundness.'

See, 29 U.S.C.A. § 1001, *et seq*. As noted earlier by the Sixth Circuit:

> ERISA was adopted in 1974. Before that time, the United States experienced a rapid growth in private employee benefit plans funded by employers and employees. To correct the perceived inadequacies of many benefit plans, prevent employer abuses, and assure stability of benefits, Congress enacted ERISA, basically as a labor law, but with preferential tax treatment for employers and employees.

General Motors Corp v. Buha, 623 F.2d 455, 459 (6th Cir. 1980). ERISA, generally, covers any employee benefit plan which is established or maintained: "(1) by an employer engaged in commerce or in any industry or activity affecting commerce; or (2) by any employee organization or organizations representing employees engaged in commerce; or (3) by both." 29 U.S.C.A. § 1003(a).

In order for a benefit plan to come within the scope of ERISA, its terms, in part, must provide that "benefits provided under the plan may not be assigned or alienated." *See* 29 U.S.C.A. § 1056(d)(1). Effectively, ERISA places this restriction against a debtor's creditors and preempts any law to the contrary which would otherwise give creditors access to a debtor's

interest in a qualifying pension plan. *See, Retirement Fund Trust v. Franchise Tax Board*, 909 F.2d 1266 (9th Cir. 1990); *Tenneco, Inc. v. First Virginia Bank*, 698 F.2d 688-90(4th Cir. 1983); *General Motors Corp. v. Buha, supra*, at 462. Generally, personal savings or investment benefit plans that are established and maintained by debtors as pension plans are not protected by ERISA and are included in a debtor's bankruptcy estate. Each challenged plan regarding inclusion in a debtor's bankruptcy estate, necessarily, must be examined on a case-by-case basis since the nature of plans vary.

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Section 13 of the subject Plan is entitled "Spendthrift Clause". That section contains the required anti-alienation language required by ERISA:

> None of the benefits, payments, proceeds, or distributions under this Plan shall be subject to the claim of any creditor of the Participant, Former Participant or to the claim of any creditor of any Beneficiary hereunder or to any legal process by any creditor of such Participant, Former Participant or any such Beneficiary; and neither such Participant shall have any right to alienate, commute, anticipate, or assign any of the benefits, payments, proceeds or distributions under this Plan.

Patterson v. Shumate, and this court's understanding of § 541(c)(2), shows that the Supreme Court expanded the scope of § 541(c)(2) to include plans. No amendments have been made to § 541(c)(2) of the Code since the *Patterson* ruling. It is well established that courts must apply a statute as its literal language directs, not in accordance with a judicial supposition to the contrary. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 243 109 S.Ct. 1026, 1031, 103 L.Ed. 2d. 290

(1989)("the plain meaning of legislation should be conclusive, except the "rare cases [in which] the literal application of the a statute will produce a result demonstrably at odds with the intentions of the drafters"); *Cline v. General Dynamics Land Systems, Inc*., 296 F.3d 466, 469 (6th Cir. 2002). Thus, to this extent, this Court concurs with the *Adams*' ruling. In order for § 541(c)(2) to apply, there must be a trust. The Debtors do not dispute the non-existence of a trust within their 403(b) plan, and the language of §541(c)(2) is unambiguous in providing that there must be a trust at issue. The analysis, however, does not stop here. Next, it must be determined whether O.R.C. § 2329.66(A)(17) exempts such a Plan.

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The State of Ohio has opted out of the federal exemption scheme. *See* Ohio Rev. Code Ann. § 2329.662. In order to maintain an exemptible interest pursuant to Ohio Revised Code §2329.66(A)(17), the Debtors must provide a federal exemption statute or other nonbankruptcy law to support the exemption. That section provides:

> (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:
>
> (17) Any other property that is specifically exempted from execution, attachment, garnishment, or sale by federal statutes other than the "Bankruptcy Reform Act of 1978," 92 Stat. 2549, 11 U.S.C.A. 101, as amended;

O.R.C. § 2329.66 (a)(17). The Debtors rely upon ERISA as the federal statute which allows the Plan's exemption and is "other than the Bankruptcy Act of 1978". *See* O.R.C. § 2329.66(A)(17). The Trustee contends that no federal statute, other than the Bankruptcy Reform Act of 1978, specifically exempts the subject Plan from execution,

attachment, garnishment, or sale as is required by O.R.C. § 2329.66(A)(17). In this regard the Trustee argues that a plan, in order to be qualified under ERISA, must provide that any benefits under the plan may not be assigned or alienated. The Trustee asserts that the language of ERISA itself does not create a specific exemption for funds held in a 403(b) Plan and that merely because the 403(b) Plan contains such language does not make the 403(b) Plan exempt. The Trustee fails to cite any authority to support this argument.

The Supreme Court clearly stated that plans containing the anti-alienation language required under ERISA are specifically exempted pursuant to §541(c)(2). *Patterso*n, 504 U.S. at 760. The parties herein do not dispute that the subject plan is ERISA qualified. *Patterson* also established that ERISA, which is a federal statute, other than the Bankruptcy Act of 1978, qualifies as applicable nonbankruptcy law under §541(c)(2) to exempt plans, such as the plan presently before this Court, from attachment. *Id*. Therefore, Ohio Revised Code § 2329.66(A)(17), in conjunction with ERISA, properly exempts the Debtors' 403(b) plan.

Accordingly, the Trustee's objection to the claim of exemption is hereby overruled. Each party is to bear its respective costs.

IT IS SO ORDERED.

Dated this 17th day of March, 2005

/s/ Randolph Baxter

RANDOLPH BAXTER
CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

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IN RE:	IN PROCEEDINGS UNDER CHAPTER 13
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Debtors.	JUDGE RANDOLPH BAXTER

JUDGMENT

At Cleveland, in said District, on this 17th day of March, 2005.

A Memorandum Of Opinion And Order having been rendered by the Court in this matter,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Trustee's objection to the claim of exemption is hereby overruled. Each party is to bear its respective costs.

IT IS SO ORDERED.

/s/ Randolph Baxter
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RANDOLPH BAXTER
CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT