

**UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF OHIO**

In Re:	)	
	)	<b>JUDGE RICHARD L. SPEER</b>
Steven/Janet Klausing	)	
	)	Case No. 12-3034
Debtor(s)	)	
	)	(Related Case: 11-35901)
Estate of Paula Minzing	)	
	)	
Plaintiff(s)	)	
	)	
v.	)	
	)	
Janet Klausing, et al	)	
	)	
Defendant(s)	)	

**DECISION AND ORDER**

This cause is before the Court on the Defendant/Debtor’s Partial Motion for Summary Judgment. (Doc. No. 18). Also before the Court is the Motion for Summary Judgment filed by the Co-Defendant, Bruce French, the bankruptcy trustee in the Defendant/Debtor’s underlying bankruptcy case. (Doc. No. 20). For each of these Motions, the respective Parties filed a memorandum in support of their position. As well, each of the Parties filed a response to the other’s motion, opposing the entry of summary judgment. (Doc. No. 23 & 24). The Court has now had the opportunity to review the arguments raised by the Parties. Based upon this review, the Court finds that the Motion of the Defendant/Debtor should be Denied; and that the Motion for Summary Judgment of the Trustee should be Granted as provided herein.

**FACTS**

The lead Defendant in this matter is Janet Rose Klausing (hereinafter the “Defendant”). The Defendant is married to Steven Paul Klausing. On October 31, 2011, the Defendant and her husband filed a petition in this Court for relief under Chapter 7 of the United States Bankruptcy Code.

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Appointed to serve as trustee in this bankruptcy case was Bruce French, the Co-Defendant in this adversary proceeding (hereinafter the “Trustee”).

The Plaintiff in this proceeding is the “Estate of Paula Minzing.” For its action, the Plaintiff set forth in its complaint that it seeks a determination that the claim it holds against the Defendant, Janet Klausing, in the amount of \$40,601.10 is a nondischargeable debt pursuant to 11 U.S.C. § 523(a)(4). In addition, as against both the Defendant and the Trustee, the Plaintiff set forth in its complaint that it “would request that the Court determine and declare the interest of the Bankruptcy Estate in the Litigation Claim.” (Doc. No. 1, at pg. 4). It is this second claim, concerning what is referred to as the “litigation claim,” which is the subject of the respective Motions for Summary Judgment filed by the Defendant and the Trustee. The facts relevant to this matter are now summarized.

Prior to filing for bankruptcy relief, the Defendant was appointed<sup>1</sup> and served as the executrix of the Estate of Paula Minzing, who died testate on September 11, 2007. To aid in her duties as an executrix, the Defendant retained the services of an attorney, James Pohlman. On November 1, 2009, the Defendant, in her capacity as executrix, filed with the probate court a “final and distributive account” for the probate estate of Paula Minzing. (Doc. No. 18, Ex. A). Exceptions to this final accounting were then filed with the probate court. After an evidentiary hearing, the probate court found some of the exceptions made against the Defendant’s final accounting to be well taken.

For damages, the probate court ordered the Defendant to personally pay to the estate of Paula Minzing the sum of \$40,926.10. *Id.* Prior to seeking bankruptcy relief in this Court, the Defendant, from her personal assets, made a payment of \$325.00 toward this liability. In terms of monetary value, the Defendant’s liability to the estate of Paula Minzing was based primarily on this exception: The Defendant improperly paid from the probate estate fees to herself and her husband for services rendered to the decedent’s estate.

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<sup>1</sup>  
Van Wert County Probate Court, Case No. 20071198.

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Based upon the decision of the probate court, the Defendant brought an action in state court against Mr. Pohlman, the attorney she had retained to represent her in legal matters concerning the estate of Paula Minzing. (Doc. No. 18, Ex. B). This action was commenced on June 6, 2011, and was brought by the Defendant in her personal capacity, and not as the executrix of the Plaintiff's probate estate. *Id.* In this action, the Defendant alleged, *inter alia*, that as a result of her attorney's "professional negligence," she "has been damaged in the sum of \$40,601.10 by virtue of a judgment which has been rendered against her." *Id.* It is this action which constitutes the "litigation claim."

**DISCUSSION**

For its second claim, the Plaintiff's complaint asks this Court to enter a declaratory judgment determining the interest, if any, of the Defendant's bankruptcy estate in her 'litigation claim' against her former attorney. The adjudication of this matter, as it requires a determination of the estate's interest in a debtor's property, is a core proceeding. Thus, this Court has been conferred with the jurisdictional authority to enter final orders and judgments in this matter. 28 U.S.C. §§ 157(b)(2)(A)/(E)/(O); *see also Wagner v. Amwest Ins. Group, Inc. (In re Amwest Ins. Group, Inc.)*, 285 B.R. 447, 455 (Bankr. C.D.Cal.2002) (determination of what constitutes property of the bankruptcy estate is akin to a turnover proceeding concerning the administration of the estate).

On the Plaintiff's complaint to determine the estate's interest in the Defendant's litigation claim, the Trustee and the Defendant each filed a Motion for Summary Judgment. The standard for summary judgment is set forth in Rule 56(a) of the Federal Rules of Civil Procedure, as made applicable to this Court by Bankruptcy Rule 7056. Under Rule 56(a), it is provided that the "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

In assessing a party's motion for summary judgment, the Court is directed to view all the facts in a light most favorable to the party opposing the motion. *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574, 586-588, 106 S.Ct. 1348, 1348, 1356, 89 L.Ed.2d 538 (1986). Furthermore, in a

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situation such as this, where more than one party has filed a motion for summary judgment, the Court must consider each motion separately, since each party, as a movant for summary judgment, bears the burden of establishing the nonexistence of genuine issues of material fact, and that party's entitlement to judgment as a matter of law. *Colonial Pacific Leasing v. Mayerson (In re Mayerson)*, 254 B.R. 407, 411 (Bankr.N.D.Ohio 2000).

When a bankruptcy case is commenced, an estate is created comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a). The scope of estate property is broad and is intended to "bring anything of value that the debtors have into the estate." H.R.Rep. No. 595, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 176 (1977), U.S.Code Cong. & Admin.News 1978, p. 6136. In this matter, with the Defendant's underlying bankruptcy case being brought under Chapter 7 of the Code, the Trustee is deemed to be a representative of the estate, charged with the duty to liquidate the Defendant's nonexempt assets for the benefit of her creditors. 11 U.S.C. §§ 323(a); 701; 704.

Predicated on these facets of bankruptcy law, the Trustee, in his Motion for Summary Judgment, asks this Court to reach these conclusions: That the prepetition malpractice action, *i.e.*, the 'litigation claim,' brought by the Defendant against Attorney Pohlman be determined to be property of the Defendant's bankruptcy estate and that he be authorized, on behalf of the estate, to continue to pursue the malpractice action in state court. (Doc. No. 20, at pg. 3). Fundamental principles of bankruptcy law afford the Trustee's position strong support.

First, under its broad scope, estate property may encompass both "tangible and intangible property, and allows the bankruptcy trustee to regain possession of property in which the debtor had equitable as well as legal title." *Demczyk v. The Mutual Life Ins. Co. of New York (In re Graham Square, Inc.)*, 126 F.3d 823, 831 (6<sup>th</sup> Cir.1997), *citing United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204 fn. 8, 205, 103 S.Ct. 2309, 2313 fn.8, 2314, 76 L.Ed.2d 515 (1983)). In this regard, it is recognized that any interest a debtor may have in a prepetition cause of action, including a legal malpractice claim, is an interest capable of being included in the debtor's bankruptcy estate. *Cottrell*

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*v. Schilling (In re Cottrell)*, 876 F.2d 540, 542-43 (6<sup>th</sup> Cir.1989) (debtor's personal injury action was an asset of the bankruptcy estate); *Terlecky, Trustee v. Baruch (In re Baruch)*, 446 B.R. 844, 848 (Bankr. S.D.Ohio 2011) (until it is abandoned, a prepetition cause of action that existed against former counsel for Chapter 7 debtor was property of the estate and could only be pressed by trustee). What is more, it is recognized that, to the extent that a debtor's interest in a cause of action constitutes property of the estate, the trustee is authorized by statute to bring suit on the cause of action for the benefit of the estate. 11 U.S.C. § 323(b) ("The trustee in a case under this title has capacity to sue and be sued.").

The Defendant counters that the legal malpractice action she commenced against Attorney Pohlman is not property of the estate, relying on her capacity as a fiduciary of the Plaintiff's probate estate. According to the Defendant, her limited role as a fiduciary of the Plaintiff's probate estate means that the "Plaintiff, as the successor in interest to the Defendant/Debtor is the real party in interest as it relates to the \$40,601.10 finding against the Defendant/Debtor as a fiduciary." (Doc. No. 24, at pg. 3). As a result, the Defendant contends that it is not the Trustee, but the Plaintiff who is "entitled to advance the claim for the legal malpractice as the fiduciary of the Probate Estate." *Id.*

The position put forth by the Defendant is necessarily based upon this feature of a debtor's bankruptcy estate: in Bankruptcy Code § 541(a), it is specified that the estate is comprised of only a debtor's "interest" in property, not the actual property itself. This feature of estate property was previously explained by the Court in these terms:

Section 541(a), by limiting the scope of estate property to just that of the debtor's "interest" in the property, does not expand or change the scope of the debtor's interest in the asset. Rather, § 541(a) merely places that "interest" in the bankruptcy estate. However, the estate's interest remains identical to and also limited to those interests held by the debtor when the petition was filed. Whatever rights a debtor had at the commencement of the case continue into bankruptcy—no more, no less.

*French v. Johnson ( In re Coomer)*, 375 B.R. 800, 804 (Bankr. N.D.Ohio 2007) (internal quotations and citations omitted). Put in slightly different terms, the Sixth Circuit Court of Appeals explained:

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Under 11 U.S.C. § 541, the trustee succeeds only to the title and rights in property that the debtor had and takes the property subject to the same restrictions that existed at the time the debtor filed the petition. Thus, a debtor's rights may not be expanded beyond what they were at the commencement of the case.

*Demczyk v. The Mutual Life Ins. Co. of New York (In re Graham Square, Inc.)*, 126 F.3d 823, 829 (6<sup>th</sup> Cir. 1997) (internal quotation omitted). Thus, as these statements show, the scope of estate property, while very broad in its reach, is not unlimited.

Based on this construct, the position forwarded by the Defendant necessarily requires an assessment of the Defendant's prepetition interest in the 'litigation claim.' In this regard, these two related questions come to the fore: Which Party, the Plaintiff or the Defendant, is the real party in interest as it pertains to the 'litigation claim' against Attorney Pohlman; and, if a judgment is ultimately entered against Attorney Pohlman, who has the right to recover on that judgment, the Plaintiff or the Defendant?

Bankruptcy law does not create or define a debtor's interest in property. *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979). Instead, the nature and extent of a debtor's interest in property is determined by applicable non-bankruptcy law, usually state law.<sup>2</sup> *Id.*; *French v. Johnson (In re Coomer)*, 375 B.R. 800, 806 (Bankr. N.D. Ohio 2007). This assessment is made as of the petition date. *Marine Midland Bank v. Scarpino (In re Scarpino)*, 113 F.3d 338, 340 (2<sup>nd</sup> Cir. 1997).

In this case, the 'litigation claim' at issue stems from Attorney Pohlman's alleged legal malpractice in representing the Defendant in her capacity as the executrix of the probate estate of Paula Minzing. For this purpose, the facts before the Court show that the probate estate of Paula

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However, whether a debtor's interest in property actually becomes a part of the bankruptcy estate is determined by bankruptcy law. *In re Prudential Lines, Inc.*, 928 F.2d 565, 569 (2<sup>nd</sup> Cir. 1991).

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Minzing was administered by an Ohio state court under the laws of Ohio; as well, the Defendant's legal malpractice claim against her former attorney is premised on Ohio law. Accordingly, the nature and extent to which the Defendant's interest in her legal malpractice claim became a part of her bankruptcy estate will be assessed by reference to Ohio law.

In Ohio, any "interested person" may offer a will for probate. O.R.C. § 2107.09. When a will offered for probate is approved and allowed, the probate court is required to appoint the executor named in the decedent's will so long as that person is not otherwise legally disqualified from serving. O.R.C. § 2113.05. Under Ohio law, an executrix is a fiduciary, and holds property of the probate estate in trust. 32 OHIO JUR 3D *Decedents' Estates* § 891. An executrix has three primary duties: (1) collection of assets; (2) payment of debts; and (3) distribution of any balance to legatees, devisees, and others entitled to share. 32 OHIO JUR 3D *Decedents' Estates* § 957.

An executor may be held to have violated their duties when they commit the act of waste, sometimes termed devastavits. Under Ohio law, the act of waste, or devastavits, may arise for any number of reasons, including under the circumstance presented here where an executor improperly pays a claim. *Joyce v. Hart*, 11 Ohio Dec.Reprint 487, 1892 WL 335 (Ohio Com.Pl. 1892). An executor found to have committed the act of waste or devastavits, may be held personally liable for their breach of duty. As explained in the case of *Sullivan v. Morgan*:

The determination of whether an administrator may be held personally liable hinges upon whether he or she acted in a good faith attempt to fulfill the duties of the position. An act of the administrator which results in a breach of trust, a misappropriation of estate assets, mismanagement of the estate, or other neglect of duty is actionable and may result in a charge against the administrator de bonis propriis, which is a judgment against an administrator to be satisfied from his own property.

Not Reported in N.E.2d, 1991 WL 115872 \*4 (Ohio App.,1991), *citing Conger v. Atwood*, 28 Ohio St. 134 (1875).

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In this case, the prepetition judgment entered by the probate court follows this paradigm by imposing liability upon the Defendant personally, and not against the Defendant in her capacity as the executrix of the Plaintiff's probate estate. It follows, therefore, that any claim for contribution the Defendant would hold against a third party – *e.g.*, Attorney Pohlman, as Defendant's former legal counsel – on account of her liability to the Plaintiff would be personal to the Defendant. Directly to the point, if the Defendant's legal malpractice claim against Attorney Polhman has merit, any financial recovery realized would belong first to the Defendant, not the Plaintiff.<sup>3</sup>

Consequently, on the earlier questions posited by the Court, the Defendant must be viewed as the real party in interest as it pertains to the 'litigation claim' pending against Attorney Pohlman. Moreover, it would be the Defendant, not the Plaintiff, who would have the right to recover on the claim. This conclusion, that the legal malpractice claim is personal to the Defendant, is further supported by an additional aspect of Ohio law.

Under Ohio law, fiduciaries, such as an executor of a probate estate, are entitled to retain the services of legal counsel. Any legal counsel retained by a fiduciary, however, works for and is a representative of the fiduciary and not the estate, with § 2109.03 of the Ohio Revised Code providing that at "the time of the appointment of a fiduciary, the fiduciary shall file in the probate court the name of the attorney, if any, *who will represent the fiduciary* in matters relating to the trust." (emphasis added). The application of § 2109.03, thus, necessarily lends itself to the conclusion that Attorney Pohlman represented the Defendant personally and not the estate of the Decedent, Paula Minzing. Therefore, only the Defendant, and not the testate estate of the Decedent, Paula Minzing, would qualify as the real party in interest to pursue a claim against Attorney Pohlman.<sup>4</sup>

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Of course, thereafter, the Defendant could utilize any recovery to satisfy her liability to the Plaintiff (assuming the Plaintiff's claim is ultimately determined to be a nondischargeable debt by the Court).

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The Supreme Court of Ohio has defined a "real party in interest" as "one who has a real interest in the subject matter of the litigation, and not merely an interest in the action itself, *i.e.*, one who is directly benefitted or injured by the outcome of the case." *Shealy v. Campbell*, 20 Ohio St.3d



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The personal nature of the Defendant’s legal malpractice claim against Attorney Pohlman also means that her claim is not excluded from the bankruptcy estate by § 541(d). This provision generally operates to exclude from property of the bankruptcy estate funds held in trust by debtor for the benefit of another.<sup>5</sup> Thus, when a debtor holds property solely in the capacity of a trustee – and thus has only legal, but not equitable title to the property – the corpus of the trust is not subject to administration by a bankruptcy trustee as property of the estate under § 541(a). *In re Signal Hill-Liberia Ave. Ltd. Partnership*, 189 B.R. 648, 651 (Bankr. E.D.Va. 1995). Section 544(d), however, has no applicability in this case because the issue before the Court does not concern the probate estate of the Decedent Paula Minzing, but rather involves only the Defendant’s personal claim against her former legal counsel, Attorney Pohlman.

For her Partial Motion for Summary Judgment, the Defendant asserted “that the unpaid Judgment portion of the Litigation claim is not an asset of this Bankruptcy Estate.” (Doc. No. 24, at pg. 5). For all the reasons discussed, the Court does not agree, and instead finds that, consistent with the position advanced by the Trustee, the Defendant’s legal malpractice claim against Attorney Pohlman constitutes a prepetition interest included in the Defendant’s bankruptcy estate. Accordingly, if and until such claim is abandoned, the Trustee may step into the shoes of the Defendant and prosecute her legal malpractice claim against Attorney Pohlman for the benefit of the Defendant’s bankruptcy estate.

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23, 24, 485 N.E.2d 701, 702 (1985).

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Section 544(d) provides:

Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

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In reaching the conclusions found herein, the Court has considered all of the evidence, exhibits and arguments of counsel, regardless of whether or not they are specifically referred to in this Decision.

Accordingly, it is

**ORDERED** that the Partial Motion for Summary Judgment filed by the Defendant/Debtor, Janet Klausing, be, and is hereby, DENIED.

**IT IS FURTHER ORDERED** that the Motion for Summary Judgment filed by the Defendant/Trustee, Bruce C. French, be, and is hereby, GRANTED.

**IT IS FURTHER ORDERED** that, on the Plaintiff's Complaint to determine and declare the interest of the bankruptcy estate in the litigation claim, it is hereby determined that said litigation claim is property of the bankruptcy estate for purposes of 11 U.S.C. § 541.

**IT IS FURTHER ORDERED** that, on the matter of the Plaintiff's Complaint to Determine Dischargeability, a Continued PreTrial is hereby set for Tuesday, December 18, 2012, at 11:30 A.M., in Courtroom No. 1, Room 119, United States Courthouse, 1716 Spielbusch Avenue, Toledo, Ohio.

Dated: November 15, 2012

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Richard L. Speer  
United States  
Bankruptcy Judge