

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 05-10427
)
ANNE M. PHOENIX,) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**

The debtor scheduled her interest in a retirement plan as an asset and claimed it as exempt. The chapter 7 trustee objects to this exemption claim. (Docket 7). For the reasons stated below, the court holds that the debtor's interest in the retirement plan is an asset of the chapter 7 estate which may be exempted. The trustee's objection to exemption is, therefore, overruled.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

FACTS

The parties submitted this issue¹ on briefs and these stipulated facts:

1. The debtor filed her voluntary petition under Chapter 7 of the Bankruptcy Code on January 13, 2005.

¹ Docket 15, 24, 26.

2. In her schedules . . . , the Debtor claimed her interest in the University Hospitals Health System 403(b) Matched Retirement Savings Plan administered by Fidelity Investments and holding approximately \$10,004.76 as exempt under the provisions of Section 2329.66(A)(17) of the Ohio Revised Code.
3. The Trustee timely filed her objection to [this] exemption.
4. The Plan summary contains a standard anti-alienation clause which provides, in relevant part:

You cannot assign, transfer, or convey any of the benefits provided by this plan to any other person or entity. Your benefits will be exempt from the claims of creditors to the maximum extent permitted by law. However, the law does permit the assignment of all or a portion of your interest in the plan to your former spouse or children as part of a Qualified Domestic Relations Order.
5. The plan summary does not include language which establishes a trust between the Debtor and the holder of the funds, Fidelity Investments, nor does it establish an express trust between the Debtor and University Hospitals Health Systems.
6. The University Hospitals Health System 403(b) Matched Retirement Savings Plan administered by Fidelity Investments complies with and is governed by ERISA.

DISCUSSION

A. The Issues

The parties raise two issues. One, is the debtor's interest in the plan excluded from the bankruptcy estate? Two, if not, may that interest be exempted from the estate under Ohio revised code § 2329.66(A)(17)? The debtor argues that the plan is excluded from the estate under bankruptcy code § 541(c)(2). She acknowledges that the plan funds are not held in trust, but

argues that this asset is excluded because the plan is ERISA-qualified.² Alternatively, if the plan is an estate asset, the debtor argues that the asset is exempt under Ohio revised code § 2329.66(A)(17). The trustee takes the contrary position on both issues. The trustee argues that § 541(c)(2) cannot be the basis for excluding the plan because the plan does not meet the trust requirement of that section. She also argues that § 2329.66(A)(17) does not apply under these circumstances.

B. Property of the Estate

A chapter 7 estate consists of “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). “Legislative history indicates section 541 is intended to be given a broad definition[.]” *Johnston v. Hazlett (In re Johnston)*, 209 F.3d 611, 613 (6th Cir. 2000). Section 541(c)(1) reinforces this intention by providing generally that restrictions on the transfer of a debtor’s property will not prevent the property from being included in the bankruptcy estate.³

² The term ERISA refers to the Employee Retirement Income Security Act of 1974, as amended.

³ 11 U.S.C. § 541(c)(1) states that: Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law—

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

11 U.S.C. § 541(c)(1).

Subsection 541(c)(2) sets forth this narrow exception to § 541:

(2) 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). The dispute in this case focuses on the meaning and effect of § 541(c)(2).

The trustee argues that the debtor's interest in the plan must literally be held in a trust to be excluded from the estate under this provision. The debtor argues that the debtor's interest in the plan is exempt under this provision because the plan is ERISA-qualified. The issue, therefore, is whether § 541(c)(2) excludes only property held in trust, or whether the exclusion extends to non-trust ERISA-qualified plans.

There are conflicting views on this issue, as set forth by the Sixth Circuit bankruptcy appellate panel in *Rhiel v. Adams (In re Adams)*, 302 B.R. 535 (B.A.P. 6th Cir. 2003). The *Adams* majority focused on the precise language of § 541(c)(2), which refers to a "beneficial interest of the debtor in a trust" and interpreted the provision literally to require a trust. The majority rejected the proposition that ERISA-qualified plans which include transfer restrictions and are designed to function like trusts are excluded from the estate, noting:

The dissent would like us to amend § 541(c)(2) so as to read: "A restriction on the transfer of a beneficial interest of the debtor in a trust or ERISA-qualified pension plan that is enforceable under applicable non-bankruptcy law is enforceable in a case under this title." We believe that if there are to be any changes in the language of § 541(c)(2) such changes must be made by Congress, not by the courts.

In re Adams, 302 B.R. at 546. The *Adams* dissent, on the other hand, concluded that an express trust is not required to exclude an ERISA-qualified plan from the bankruptcy estate:

The majority has advanced no policy considerations that support their more restrictive reading of section 541(c)(2). Instead their conclusion rests solely upon the literal requirement that a debtor's beneficial interest be held "in a trust." This emphasis on the asserted plain meaning of one section of the Bankruptcy Code fails to give proper deference to the unqualified prohibition on alienation found in ERISA. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one." *Morton v. Mancari*, 417 U.S. 535, 550-51, 94 S.Ct. 2474, 2482-83, 41 L.Ed.2d 290 (1974) quoted in *Guidry*, 493 U.S. at 375, 110 S.Ct. 680. It is not section 541(c)(2) that excludes a debtor's beneficial interest in an ERISA-qualified plan from the bankruptcy estate, but rather the anti-alienation provision itself which excludes it.

Id. at 547-48.

The court finds the reasoning and conclusions set forth by the *Adams* majority to be persuasive and, therefore, adopts and incorporates that analysis by reference. Since the parties have stipulated that the plan does not involve a trust, the plan is not excluded from the chapter 7 estate under § 541(c)(2).

C. Ohio Revised Code § 2329.66(A)(17)

Debtors are entitled by statute to exempt certain property from the bankruptcy estate. *See* 11 U.S.C. § 522(b). For debtors who file their bankruptcy cases in Ohio, the property that can be exempted is set out in Ohio revised code §2329.66.⁴ *See* 11 U.S.C. § 522(b) (permitting a state to opt-out of the federal exemptions and use state exemptions instead) and OHIO REV. CODE § 2329.662 (in which Ohio opts-out of the federal bankruptcy exemptions)). In this case, the debtor asserted an exemption under § 2329.66(A)(17) as to her interest in the plan. That section

⁴ Property that is exempt under federal law (other than § 522(d)) is also exempt in Ohio. *See* 11 U.S.C. § 522(b)(2)(A). The debtor has not argued that her plan interest is exempt under this provision.

provides that a debtor may exempt:

(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 [.]

OHIO REV. CODE § 2329.66(A)(17). This section exempts a debtor’s interest in an ERISA-qualified plan. *See Iron City Sash & Door Co. v. Mohl*, 1988 WL45451, at *4 (Ohio Ct. App. 1988) (holding that this provision (formerly numbered as § 2329.66(A)(16)) exempts funds held in an ERISA-qualified plan). *See also Mid-American Fed. Sav. & Loan Assoc. v. Gateway Manor Congregate Apartments*, 641 N.E.2d 229, 232 (Ohio Ct. App. 1994) (holding that a judgment creditor was not precluded from garnishing a debtor’s Keogh plan under this provision because the plan was not ERISA-qualified).

The trustee argues that this exemption should not be allowed because allowing it “ignores the fact that it is solely the anti-alienation language of ERISA which provides any such exemption and it is that language which is unenforceable in . . . bankruptcy under the provisions of § 541(c)(1) of the [b]ankruptcy [c]ode[.]”⁵ This argument lacks merit. The bankruptcy code has separate provisions establishing which property is included in the estate (§ 541) and which estate property can then be exempted (§ 522). They operate independently. Therefore, while the inclusion of an ERISA anti-alienation provision may not keep the debtor’s interest in the plan from being included in the estate under § 541, the debtor is permitted to exempt property as permitted under § 522 and applicable state law. The debtor’s exemption claim is appropriate

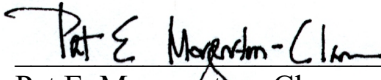
⁵ It is not disputed that the plan is ERISA-qualified for purposes of exemption.

because the Ohio exemption statute incorporates the federal ERISA exemption and permits debtors to exempt interests in ERISA-qualified plans.

CONCLUSION

For the reasons stated, the debtor is entitled to exempt her interest in the retirement fund and the trustee's objection to the claim of exemption is overruled. A separate order will be entered in accordance with this decision.

Date: 19 July 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

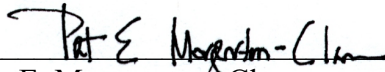


In re:) Case No. 05-10427
)
ANNE M. PHOENIX,) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **ORDER**

For the reasons stated in the memorandum of opinion filed this same date, the debtor is entitled to exempt her interest in the retirement fund and the trustee's objection to the claim of exemption is overruled. (Docket 7).

IT IS SO ORDERED.

Date: 19 July 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center