

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: August 19 2005

A handwritten signature in blue ink, appearing to read "Mary Ann Whipple".

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No. 05-32042
)	
Christopher D. Rohrbacher,)	Chapter 7
)	
Debtor.)	
)	JUDGE MARY ANN WHIPPLE

MEMORANDUM AND ORDER GRANTING MOTION OBJECTING TO EXEMPTION

This case came before the court for hearing on the Chapter 7 Trustee's Motion Objecting to Exemptions [Doc. # 19] and Debtor's response [Doc. # 26]. The Trustee appeared at the hearing in person. No appearance was made on behalf of Debtor. The Trustee objects to an exemption claimed by Debtor under Ohio Revised Code § 2329.66(A)(6)(b). The court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334(b) and the general order of reference entered in this district. This is a core proceeding that the court may hear and decide under 28 U.S.C. § 157(b)(1) and (b)(2)(B). Having considered the motion and Debtor's response, for the reasons discussed below, the court will grant the motion.

BACKGROUND

The relevant facts are simple and undisputed. Debtor filed his Chapter 7 bankruptcy petition on March 13, 2005. His amended bankruptcy schedules list personal property, including a life insurance policy with a cash surrender value of \$2,123.70. Although the policy previously named Debtor's ex-wife as the

primary beneficiary and his mother as a contingent beneficiary, three weeks before filing his petition Debtor changed the named beneficiaries. At the time of filing, the policy named his mother, Emily Barry, as the primary beneficiary and Debtor's two children as contingent beneficiaries. According to Debtor, the change was made to prevent his ex-wife from controlling the insurance proceeds in the event of his death. Debtor does not contend, nor do his bankruptcy schedules suggest, that his mother is his dependent. [See Doc. # 1, Schedule I (listing only his children as his dependents)]. Nor does he contend that she is his creditor. [See *id.*, Schedules D, E, and F]. The Trustee does not dispute Debtor's reason for changing the named beneficiaries but argues that § 2329.66(A)(6)(b) does not provide an exemption in a life insurance policy that names the debtor's mother as the primary beneficiary.

LAW AND ANALYSIS

Section 2329.66(A)(6)(b) of the Ohio Revised Code provides for an exemption in a life insurance policy "as exempted by section 3911.10 of the Revised Code."¹ Section 3911.10 provides as follows:

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 an institution or entity described in division (B)(1) of section 3911.09 of the Revised Code, 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 the creditors of such insured person or annuitant.

Under Bankruptcy Rule 4003(c), the party objecting to the exemption, in this case the Trustee, has the burden of establishing that the debtor is not entitled to the claimed exemption. *In re Andrews*, 301 B.R. 211, 213 (Bankr. N.D. Ohio 2003). In making this determination, and in order to further the fresh-start policy of the Bankruptcy Code, exemption statutes are to be liberally construed in a debtor's favor. *Id.* Nevertheless, "a court cannot create an exemption where one does not exist; nor can a court go contrary to the express language of the statute." *In re Bunnell*, 322 B.R. 331, 334 (Bankr. N.D. Ohio 2005).

Debtor's mother does not fit under any category of beneficiaries listed in § 3911.10 that would result in the life insurance policy being exempt from claims of creditors in Debtor's bankruptcy case. Under § 3911.10, a life insurance policy may be claimed as exempt only if the beneficiary of the policy is the insured's spouse, child, dependent, or creditor, is an institution or entity described in § 3911.09(B)(1), or

¹ Although Debtor also refers to Ohio Revised Code §§ 3911.12 and 3911.14 in his bankruptcy Schedule C, the court finds neither of those statutes have any relevance to an exemption to which Debtor is entitled in his life insurance policy.

is a trustee of a trust for the benefit of one of the listed beneficiaries. Debtor's mother is obviously not his spouse or child, and is not a dependent or creditor of Debtor. Nor is she an institution or entity described in § 3911.09(B)(1).² Finally, Debtor's mother is named the beneficiary in her own right and not as a trustee.

In *Bunnell*, the court was faced with a similar factual scenario. The debtor claimed an exemption in her life insurance policy that named her sister as the sole beneficiary. The debtor had a prior testamentary will in effect wherein she bequeathed all of her property in trust, naming her sister as the trustee and her children as the sole beneficiaries. *Bunnell*, 322 B.R. at 333. The debtor argued that in naming her sister individually as the beneficiary of her life insurance policy, she intended any insurance proceeds to be paid to her sister in trust for the debtor's children. The court rejected this argument, finding that both policy considerations and basic contractual principles dictated its conclusion. The court found that the debtor's position that a policy owner's later assertion of their intent may control over an unambiguous beneficiary designation would undermine the policy decision of the Ohio legislature to limit the class of protected beneficiaries since "every debtor, when faced with a nonqualifying beneficiary, could make a later assertion to the contrary." *Id.* at 335. The court also explained that settled contractual principles require a court, where the contract is unambiguous, "to presume that the parties' intent resides in the words of the agreement; parol or other extrinsic evidence is inadmissible for the purpose of varying or contradicting the writing." *Id.* Therefore, the court found that "it cannot just be assumed that, in naming her sister individually as the beneficiary of her life insurance policy, the Debtor intended to create a trust for the benefit of her children." *Id.*

This court finds the reasoning in *Bunnell* persuasive. To the extent that Debtor's argument is that his life insurance policy was "taken out for the benefit of" his children within the meaning of the statute, and that in naming his mother individually as the beneficiary, he intended to create a trust for their benefit, his argument is not well taken. As Debtor's mother does not otherwise fall within the protected beneficiary categories in § 3911.10, Debtor is not entitled to claim an exemption under § 2329.66(A)(6)(b).

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that the Trustee's Motion Objecting to Exemptions [Doc. #19] be, and hereby is, **GRANTED**, and Debtor's claim of exemption under Ohio Rev. Code § 2329.66(A)(6)(b) be, and hereby is, **DISALLOWED**.

² Such institutions and entities include "[a]ny religious, charitable, scientific, literary, educational, or other institution or entity that is described in section 170, 501(c)(3), 2055, or 2522 of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C.A. 170, 501, 2055, 2522, as amended. . . ." Ohio Rev. Code § 3911.09(B)(1).