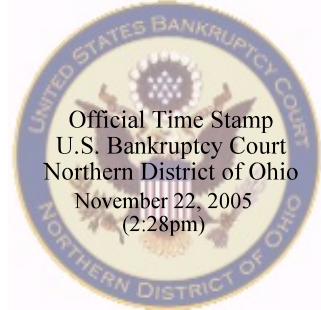


THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 04-26076
)
MARCIE M. KONSTANTINOS,) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**

The debtor Marcie Konstantinos scheduled her interest in an annuity as an asset in her chapter 7 case and claimed it as exempt. The chapter 7 trustee objects to the exemption claim. (Docket 9). For the reasons stated below, the trustee’s objection is sustained in part and overruled in part.

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

After filing a copy of the debtor’s employer-sponsored plan,¹ the parties submitted this issue for decision on briefs.² These undisputed facts are gleaned from the case docket, the

¹ See docket 51.

² The evidentiary hearing scheduled in this matter (docket 25), did not go forward because the debtor had not provided the plan and also wanted to amend her exemption claim. (Docket 37, 39). After addressing those issues, the matter was submitted without an evidentiary hearing. See docket 19, 30, 34, 49, 57, 61.

pleadings, and the plan:

1. The debtor filed her voluntary petition under chapter 7 of the bankruptcy code on December 20, 2004.
2. The debtor's employer Southwest General Health Center established the Matching Plan (the plan), which is a retirement plan that authorizes the use of annuity contracts as an investment option. The debtor participates in the plan.
3. The plan contains an anti-alienation clause which provides, in relevant part:

No portion of the account balance with respect to any Participant shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, or charge except in the case of a qualified domestic relations order as described in Code Section 414(p), or any judgment or settlement described in Code Section 401(a)(13)(C)

4. The plan is intended to qualify as a §403(b) profit sharing plan and does not include language which establishes a trust.
5. The debtor amended her exemption claim a number of times. As it stands, she now claims as exempt her interest in her Southwest General Health Center Tax Sheltered Annuity, Group No. 0082131 in the approximate amount of \$11,265.56 (the annuity) under the provisions of Ohio revised code § 2329.66(A)(17). The record does not indicate how the annuity funds are held.

DISCUSSION

A. The Dispute

The trustee's objection raises two issues:

- (1) Is the debtor's annuity interest property of the bankruptcy estate?

(2) If so, may she exempt that interest from the estate under Ohio revised code § 2329.66(A)(17)?³

The debtor argues that the annuity is excluded from the bankruptcy estate under bankruptcy code § 541(c)(2) because the plan is ERISA⁴-qualified. Alternatively, the debtor argues that the annuity 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) does not exclude the annuity from the estate because it does not meet that section's trust requirement. She also argues that § 2329.66(A)(17) does not apply because the debtor has not identified a statute (other than the bankruptcy code) under which the annuity is exempt.

B. Property of the Bankruptcy 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

³ The trustee's supplemental brief also argued that the debtor did not cooperate in providing information and documentation regarding her annuity and that any ambiguity regarding the debtor's scheduling of her exemption should be resolved in the trustee's favor. (Docket 57). The debtor resolved that ambiguity by stipulating that she is relying “exclusively on Ohio Revised Code § 2329.66(A)(17) as the sole basis for her claim to exemption in the Plan.” (Docket 41, 61 at 1).

⁴ The term ERISA refers to the Employee Retirement Income Security Act of 1974, as amended.

included in the bankruptcy estate.⁵

Subsection 541(c)(2) establishes a 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 parties dispute the meaning and effect of § 541(c)(2). The debtor bears “the burden of demonstrating that all the requirements of § 541(c)(2) have been met[.]” *Rhiel v. Adams (In re Adams)*, 302 B.R. 535, 540 (B.A.P. 6th Cir. 2003).

The trustee argues that the debtor’s annuity interest must literally be held in a trust to be excluded from the estate under this provision. The debtor argues that the debtor’s interest 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.

The conflicting views on this issue are set forth by the Sixth Circuit bankruptcy appellate panel decision in *Rhiel v. Adams (In re Adams)*, 302 B.R. 535 (B.A.P. 6th Cir. 2003). The

⁵ 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).

Adams majority focused on the 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.

This court finds the reasoning and conclusions of the *Adams* majority to be persuasive and, therefore, adopts and incorporates that analysis by reference. Since there is no proof that

either the plan or the debtor's annuity interest involve a trust, the debtor's annuity interest is not excluded from the bankruptcy estate under § 541(c)(2). The trustee's objection on this point is sustained.

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. *See* 11 U.S.C. § 522(b)⁶ (permitting a state to opt-out of the federal bankruptcy exemptions and use state exemptions instead) and OHIO REV. CODE § 2329.662 (under which Ohio opts-out of the federal bankruptcy exemptions). In this case, the debtor asserts an exemption under § 2329.66(A)(17) as to her annuity interest. That section 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). Section 2329.66(A)(17) has been interpreted to permit a debtor to exempt an 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). More specifically, § 2329.66(A)(17) has been interpreted to permit a debtor to exempt an ERISA-qualified § 403(b) annuity. *See In re Sforzo*, 2005 WL 2491479 (Bankr. N.D. Ohio 2005). This court accepts that interpretation and concludes that § 2329.66(A)(17) permits debtors to exempt

⁶ Amendments to § 522 made by the Bankruptcy Abuse Prevention and Consumer Protection Act do not apply here because this case was filed before their effective date.


funds held in an ERISA-qualified § 403(b) plan. As the plan at issue contains an antialienation provision and appears to be ERISA-qualified, the debtor may exempt her annuity interest under § 2329.66(A)(17).

The trustee argues that the debtor failed to provide the documentation she needed to evaluate this exemption claim and that her objection should be sustained for that reason. The trustee, however, bears the burden of showing that the exemption should not be allowed and has not done so. *See Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 723 (B.A.P. 6th Cir. 1999). The plan which was submitted as evidence includes an antialienation provision and states that it is intended to be ERISA-qualified. The trustee has not shown that the plan is not exempt under § 2329.66(A)(17). Moreover, she has not shown that the debtor failed to provide the documentation which she requested and needed to evaluate this exemption claim.⁷

CONCLUSION

For the reasons stated, the debtor's annuity is not excluded from the bankruptcy estate under 11 U.S.C. § 541(c)(2), but she is entitled to exempt it under Ohio revised code § 2329.66(A)(17). A separate order will be entered in accordance with this decision.

Date: 22 November 2005



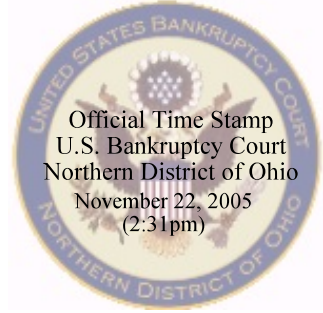
Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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⁷ The debtor was previously sanctioned for failing to appear at a rule 2004 examination and was ordered to provide the trustee with a copy of the plan. Docket 37, 39, 47. If the debtor failed to provide additional discovery, the trustee could have requested additional sanctions under civil rule 37. *See Fed. R. Civ. P. 37* (made applicable in contested bankruptcy matters by FED. R. BANKR. P. 9014 and 7037).

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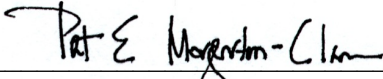


In re:) Case No. 04-26076
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MARCIE M. KONSTANTINOS,) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **ORDER**

For the reasons stated in the memorandum of opinion filed this same date, the trustee's objection to the debtor's claim of exemption is sustained in part and overruled in part and the debtor is entitled to exempt her interest in the Southwest General Health Center Tax Sheltered Annuity. (Docket 9).

IT IS SO ORDERED.

Date: 22 November 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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