

The court incorporates by reference in this paragraph and adopts as the findings and analysis 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.

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CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
TOLEDO



Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No. 07-32411
)	
Memory M. McMinis)	Chapter 7
)	
Debtor(s).)	
)	JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION

This case is before the court on Ericka S. Parker’s motions for turnover [Doc. ## 8, 9] (collectively “the Motion”). Parker (“the Trustee”) is the duly appointed and acting trustee in the Chapter 7 case of Debtor Memory Mae McMinis (“Debtor”). The Trustee filed two motions seeking turnover to her for administration of \$15,257.12 in funds alleged to have been on deposit in a bank account in Debtor’s name as of the date of filing of Debtor’s petition. One of the motions is directed at Debtor, as the funds had been dissipated in part after the commencement of the case,¹ and the other motion is directed at the bank at which the account was located with respect to the balance of the funds on hand. Debtor contests the Motion, arguing that the funds were not hers because she was holding them in trust for a friend. While on the face of it that argument sounds questionable if not downright preposterous, for the reasons explained below the

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The Sixth Circuit Bankruptcy Appellate Panel recently held that a Debtor’s obligation to turnover property of the estate under 11 U.S.C. § 542 is not defeated because the property is no longer in the Debtor’s possession or control at the time turnover is sought by the Trustee. *Bailey v. Suhar (In re Suhar)*, 380 B.R. 486 (B.A.P. 6th Cir. 2008)(debtor’s tax refund had been spent when trustee sought turnover).

court finds that the evidence presented to the court, including the testimony of Debtor and Thomas Wieland, as well as an Affidavit of Debtor and various documents admitted as evidence, establish that the funds in the account in issue as of the commencement of the case were not Debtor's funds and are thus not subject to turnover to the Trustee. The court has considered all of the evidence even if not specifically referred to in this opinion.

The court has jurisdiction over Debtor's Chapter 7 case under 28 U.S.C. §1334 and the general order of reference entered in this district. *See* 28 U.S.C. § 157(a). Proceedings with respect to turn over of property of the estate are core proceedings that the court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(E).

FINDINGS OF FACT

Debtor filed her Chapter 7 petition on June 6, 2007. She disclosed on her Schedule B only one bank account, a "State Bank - checking account" specified as having a zero balance. [Doc. #1]. In her Statement of Financial Affairs, in response to Question 14 requiring her to list all property owned by another person that debtor holds or controls, Debtor identified only a 2001 Chevy Impala in her name as POA for Thomas Wieland. [*Id.*]. In response to Question 11 regarding all financial accounts held in the name of the debtor that were closed in the year preceding filing, Debtor answered none. [*Id.*]. The Trustee received a tip, however, that Debtor had another bank account. Indeed she did.

The evidence shows that as of the June 6, 2007, commencement of her Chapter 7 case Debtor also had a Money Market Plus savings account at the State Bank and Trust Company ("Money Market Account"). [Hearing Ex. 3]. The tax name on the Money Market Account was only Memory Mae McMinis, with no indication of any trust or POA involved. The account appears to have been opened on May 29, 2007, with a deposit of \$7,267.12 and a subsequent deposit of \$8,000.00 on May 31, 2007, for the total of \$15,267.12 claimed by the Trustee as property of the estate. The evidence at the hearing shows, however, that the actual balance in the Money Market Account as of the June 6, 2007, a commencement of the case was only \$14,757.04, a \$500.00 withdrawal and a service charge of \$10.00 having been debited against the account and a small interest payment of \$0.62 having been credited to the account. The amount in issue is thus \$14,757.12.²

Debtor asserts that the funds in the Money Market Account as of the filing date of her petition

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Between June 6, 2007, and June 27, 2007, shortly after the Motion was filed, the account balance was reduced to \$8,059.30 by additional withdrawals by Debtor. As the court has determined this dispute, the propriety of these withdrawals is for Debtor and Mr. Wieland to sort out as between them.

actually belonged to Thomas Wieland. The key issue in deciding the Motion is to determine the source of the funds from which the two deposits to the Money Market Account were made on May 29, 2007, and May 31, 2007. That requires consideration of Mr. Wieland's personal circumstances and two other bank accounts that Debtor controlled besides the Money Market Account, one being the checking account (account 210091) listed on her Schedule B ("Checking Account") and the other being a regular savings account (account 225660) also at State Bank and Trust Company, in the name of Memory McMinis and Deanna Dudley ("Savings Account"). There is no evidence in the record, however, to show that Deanna Dudley, Debtor's daughter, had any interest in the funds in the Savings Account.

Mr. Wieland was 18 years old at the time of the hearing. The court credits his hearing testimony as truthful. Mr. Wieland has generally been ill-served by the adults in his life, including Debtor. He described Debtor, who is 46, as a family friend, not a relative and not his girlfriend. Mr. Wieland's father had died and as a result Mr. Wieland became the beneficiary of an annuity contract, funded from the proceeds of his father's life insurance, issued by Sun Life Assurance Co. of Canada that would pay him income monthly for 10 years. [Hearing Ex. 8; Doc. #21, ¶ 1]. However, Mr. Wieland got into trouble and ended up in jail, with the expectation at the time of the hearing that he would be returning to jail. He needed money to get out of jail and to pay a lawyer to represent him in addressing his legal situation. Accordingly, he sold his rights under the annuity contract to Henderson Trust, giving up his right to \$100,000 paid monthly over 10 years for a lump sum of \$60,000. Mr. Wieland's mother was also in trouble and not capable of helping him or handling his money for his benefit. Thus, while he was in jail at the Corrections Center of Northwest Ohio, Mr. Wieland signed a Power of Attorney form, giving Debtor the complete authority to handle all of his personal and financial matters. That included handling the lump sum settlement of his rights under the annuity. [Hearing Ex. 1].

The records for the Checking Account, which was in Debtor's name only and bore no indication of any trust relationship associated therewith, show that the on April 9, 2007, it had a balance of \$115.51.[Hearing Ex. 2]. Thus, prior deposits to the account that month from Debtor's two pay checks of \$933.97 each, plus a \$40.00 transfer from the Savings Account, had essentially been completely withdrawn by Debtor by April 9, 2007. On April 10, 2007, a deposit of \$58,999.86 was made to the Checking Account. Both Debtor and Mr. Wieland testified that these were the funds from the lump sum settlement of his annuity contract rights. The court believes both witnesses' testimony on this point and finds that the \$58,999.86 deposited into Debtor's Checking Account was Mr. Wieland's money in which Debtor had no equitable interest. One other deposit was made and shown on the April 17, 2007, statement for the

Checking Account. Specifically, \$2,334.00 was deposited from the U.S. Treasury on account of a tax refund. The court finds that these were Debtor's funds. As shown on the April 17, 2007, statement for the Checking Account, the \$2,334.00 can be traced directly out of the Checking Account to the Savings Account.

As shown on the April 17, 2007, statement for the Checking Account, a spending spree³ with the funds ensued. By April 17, 2007, there was a \$34,003.39 balance in the Checking Account. [Hearing Ex. 2]. By the May 15, 2007, statement date there was only \$14,377.26 left in the Checking Account, including after deposits of approximately \$3,054 were made in May by Debtor from Debtor's funds. [*Id.*]. By the June 6, 2007, filing date of Debtor's petition, there was only \$186.61 left in the Checking Account, [Hearing Ex. 10], although Debtor scheduled it at a zero balance, [Doc. #1, Schedule B].

The evidence shows that as of April 6, 2007, there was only \$210.89 in the Savings Account. [Hearing Ex. 4]. On April 10, 2007, there was a transfer into the Savings Account in the amount of \$5,741.00. [*Id.*]. The source of the funds for the transfer was the Checking Account. [*Id.*]. There is no explanation in the record for this odd amount, but it is clear from the Checking Account records that these were Mr. Wieland's funds from the lump sum annuity settlement. The next deposit was the \$2,334 from Debtor's tax refund, traced directly from the Checking Account. Additional Deposits of \$400.00 on April 17, 2007, \$2,500 on April 19, 2007, \$1,050 on May 3, 2007, \$1000.14 on May 11, 2007, and \$1400.00 on May 17, 2007, were made to the Savings Account. Of these deposits, in addition to Debtor's tax refund amount of \$2,334.00, the \$1,050 amount can be traced back to the Checking Account and in turn to Debtor's pay check deposit into the Checking Account; the dates and amounts (within \$.09)match. Likewise, the \$1,000.14 deposit into the Savings Account amount can be traced back to the Checking Account deposit on the same date; there is no showing that this deposit is from Mr. Wieland's funds and the court finds that these were Debtor's funds. The other deposits of \$2,500 and \$400 came from the Checking Account. The transfer date from the Checking Account of \$2,500 matches the date of a deposit of \$1,003.65 for Debtor's paycheck. The court thus finds that \$1,003.65 of the \$2,500.00 transferred into the Savings Account was Debtor's and the balance of \$1,496.35 was Mr. Wieland's money from the lump sum

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Again, the court makes no findings, nor does it need to in order to decide the Motion, as to whether all of the withdrawals that did not find their way into other accounts were for the benefit of Mr. Wieland or of Debtor. Except for the small amounts deposited from Debtor's funds, which can generally be traced out of the Checking Account, the money was Mr. Wieland's from the lump sum annuity settlement. Whether the funds were actually spent for his benefit is an issue as between Debtor and Mr. Wieland that is ultimately not relevant to the Motions.

settlement deposited into the Checking Account.⁴ The court also finds that the \$400.00 deposit into the Savings Account on April 17, 2007, from the Checking Account was Mr. Wieland's money, as there were no funds at that point in the Checking Account that were Debtor's funds. Thus, Debtor's funds were commingled with Mr. Wieland's funds in the Savings Account. Of the total deposits into the Savings Account after April 6, 2007, \$9,037.35 was from Mr. Wieland's funds (\$5,741 + \$400 + \$1,496.35 + \$1,400) and \$5,387.79 (\$2,334.00 + \$1,003.65 + \$1,050.00 + \$1,000.14) was from Debtor's funds.⁵ In addition to deposits into the Savings Account, there were numerous debits against the account. Finally, on May 29, 2007, the account balance was drawn down to zero with the withdrawal of \$7,267.12.

The \$7,267.12 withdrawn from the Savings Account was the initial deposit into the Money Market Account on May 29, 2007. [Hearing Ex. 3]. Beyond a small amount of interest, the only other deposit into the Money Market Account was \$8,000.00 transferred from the Checking Account on May 31, 2007. Based on the daily balances in the Checking Account as shown on Hearing Exhibits 2 and 10, the court finds that the \$8,000.00 transferred into the Money Market Account were Mr. Wieland's funds from his lump sum annuity settlement.

CONCLUSIONS OF LAW

The issue before the court is whether the \$14,757.12 in the Money Market Account at the filing of the petition is property of the bankruptcy estate subject to turnover under the circumstances presented. The turnover provision of the Bankruptcy Code provides that "an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, . . . shall deliver to the trustee . . . such property or the value of such property, unless such property is of inconsequential value or benefit to the estate." 11 U.S.C. § 542(a). In order to prevail, the Trustee must demonstrate that the funds in issue are property the trustee may administer under § 363; that is, the funds must be property of the estate. *United States v. Chalmers (In re Wheeler)*, 252 B.R. 420, 425 (W.D. Mich. 2000); 11 U.S.C. § 363(b)(1) (providing that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, *property of the estate*").

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This finding conflicts with Debtor's sworn statement in her affidavit, [Doc. #21], which the court discounts because she does not account for the match between the deposit date and the transfer date. Based on the pattern shown by later deposits of Debtor's funds into the Checking Account and with matching transfers into the Savings Account, the court finds that at least part of the transfer was from Debtor's funds.

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Debtor made a \$200.00 deposit to the Savings Account on April 6, 2007, before Mr. Wieland's funds were received, and interest of \$1.09 was credited on May 29, 2007. Total deposits to the account as shown on Hearing Exhibit 10 before the account was drawn down to a zero balance on May 29, 2007, were thus \$14,626.23.

The bankruptcy estate is 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)(1). However, “[p]roperty in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate under subsection (a)(1) . . . 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.” *Id.* § 541(d).

While she does not say so explicitly, Debtor is arguing under § 541(d) that she has only legal title to the funds in the Money Market Account pursuant to the power of attorney granted by Mr. Wieland, with the equitable interest in the funds belonging to Mr. Wieland and thus property that the Trustee cannot administer for the benefit of Debtor’s creditors as property of the estate. As such, Debtor is arguing that the funds in the Money Market Account were impressed with a trust for the benefit of Mr. Wieland. *See Poss v. Morris (In re Morris)*, 260 F.3d 654, 670 (6th Cir. 2001)(where Debtor does not own an equitable interest in property he holds in trust for another, that interest is not property of the estate); *XL/Datacomp, Inc. v. Wilson (In re Omegas Group, Inc)*, 16 F.3d 1443, 1449 (6th Cir. 1994)(explaining that “[a] debtor that served prior to bankruptcy as trustee of an express trust generally has no right to the assets kept in trust, and the trustee in bankruptcy must fork them over to the beneficiary.”).

Notwithstanding that the Trustee generally has the burden of proof on a motion for turnover, where a party seeks to impress funds with a trust for purposes of preventing them from being treated as property of a bankruptcy estate, that party must prove and identify the trust and the funds constituting the trust res. *First Federal of Michigan v. Barrow*, 878 F.2d 912 (6th Cir. 1989). In the absence of controlling federal bankruptcy law, the substantive nature of a debtor’s property interest is defined by state law. *Spradlin v. Jarvis (In re Tri-City Turf Club, Inc)*, 323 F.3d 439, 443(6th Cir. 2003).

Under Ohio law, the elements of an express trust are an intent to create a trust, the existence of trust property, and a fiduciary relationship. *See Brown v. Concerned Citizens for Sickle Cell Anemia, Inc.*, 56 Ohio St. 2d 85 (1978). “An express trust may be created even though the parties do not understand what a trust is, and whether or not so created may be determined from all the circumstances surrounding the transactions between the parties.” *Norris v. Norris*, 57 N.E.2d 254, 258 (Ohio App.1943).

The court finds that Debtor has met her burden of showing that she and Mr. Wieland entered into a trust relationship with respect to the lump sum settlement funds. Mr. Wieland’s testimony demonstrated that he handed the funds over to Debtor to take care of them for his benefit; in the absence of his parents Mr. Wieland understood that Debtor would act in loco parentis with respect to the money, so that it would

not be wasted, a goal that seems not have been met, but the understanding of the parties nevertheless. As Mr. Wieland testified, he gave Debtor his POA so she could pay his bills and help him manage his money. He understood that he would have to ask her for money and she would give it to him; he did not write checks or use the debit card. Some of his bills were put in her name. The evidence shows that the parties intended to create a trust arrangement, the trust res was the \$58,999.86 deposit of the lump sum settlement from Mr. Wieland's annuity contract into the Checking Account and Debtor assumed a fiduciary relationship to Mr. Wieland under the POA.

The issue is whether the funds in the Money Market Account were impressed with the trust the parties created. The Trustee met her burden for purposes of turnover that the funds were held in an account only in Debtor's name, with no indication of a trust relationship. Debtor must prove that the trust extended to the Money Market Account funds. *First Federal of Michigan*, 878 F.2d at 915. As explained above, the funds in the account at filing were derived virtually completely from two deposits, the \$7,267.12 transferred from the Savings Account and used to open the Money Market Account on May 29, 2007, and the \$8,000.00 transferred from the Checking Account on May 31, 2007.

As to the \$8,000.00 deposit, the court has determined as a matter of fact that it was Mr. Wieland's money from the lump sum settlement amount originally deposited in the Checking Account. Thus, the court finds based on the tracing of those funds from the Checking Account that the \$8,000.00 is impressed with the trust, with the equitable interest in the funds belonging to Mr. Wieland. The Trustee is not entitled to turnover of \$8,000.00 of the funds in the Money Market Account as of June 6, 2007.

The \$7,267.12 deposit is more complicated. While it can be traced directly from the Savings Account, as the court determined above the Savings Account was comprised of both Mr. Wieland's funds and Debtor's funds and many withdrawals were then made from the account. When tracing trust funds in a commingled account, the method of analysis employed by the Sixth Circuit is the "lowest intermediate balance" rule. *Id.*, at 916; *Meoli v. Kendall Electric, Inc. (In re R.W. Leet, Inc.)*, 372 B.R. 846, 857 (B.A.P. 6th Cir. 2007). As described in *First Federal of Michigan*,

The situation frequently occurs where trust funds have been traced into a general bank account of the debtor. The following general principles have been applied. The bankruptcy court will follow the trust fund and decree restitution where the amount of the deposit has at all times since the intermingling of funds equaled or exceeded the amount of the trust fund. But where, after the appropriation and mingling, all of the moneys are withdrawn, the equity of the cestui is lost, although moneys from other sources are subsequently deposited in the same account. In the intermediate case where the account is reduced to a smaller sum than the trust fund, the latter must be regarded as dissipated, except as to the balance, and

funds subsequently added from other sources cannot be subjected to the equitable claim of the cestui que trust. If new money is deposited before the balance is reduced, the reduction should be considered to be from the new money and not from monies held in trust. This analysis may be referred to as the lowest intermediate balance test.

First Federal of Michigan, 878 F.2d at 916 (citing *Collier on Bankruptcy* P 541.13 (15th ed. 1988)).

The court must apply the lowest intermediate balance rule to the Savings Account to determine whether the \$7,267.12 deposited into the Money Market Account is impressed with the trust for the benefit of Mr. Wieland. The court construes that tracing requires that the lowest intermediate balance test must be applied on an account by account basis. As determined above, the total amount of the trust funds deposited into the Savings Account from the Checking Account was \$9,037.35. Hearing Exhibit 4 itemizes the reductions and increases in balances in the Savings Account. After the \$5,741 deposit of Mr. Wieland's funds, the balance in the Savings Account never dropped below that amount such that deposits of Debtor's funds should not be considered for his benefit in connection with withdrawals made therefrom. *See In re Al Copeland Enters., Inc.*, 133 B.R. 837, (Bankr W.D. Tex. 1991)(opinion of the bankruptcy court), *aff'd by Matter of Al Copeland Enters., Inc.*, 991 F.2d 233 (5th Cir. 1993)("[A] all [relevant] times the Debtor had sufficient funds on hand to fully pay the trust fund claims. This latter requirement is imposed because if the balance of cash on hand on any interim day was less than the amount of the trust fund claims, then the trust fund claims are limited to that 'lowest intermediate balance.'"). After the \$400.00 deposit from Mr. Wieland's funds on April 17, 2007, the trust funds deposited in the account totaled \$6,141.00. The balance never dropped below that amount. After the \$1,496.35 deposit of trust funds into the account on April 19, 2007, the total trust funds deposited into the Savings Account, and the amount that could be claimed by Mr. Wieland, were \$7,637.35. The balance did not drop below that amount until May 14, 2007. However, after that date, the next deposit of funds was not from Debtor's funds, but from trust funds, with the \$1,400.00 deposit on May 17, 2007, from the Checking Account. As these deposited funds were trust funds, these funds may also be considered as Mr. Wieland's; if they had been deposited from other sources, they could not have been considered his since the balance had dropped below the trust funds amount and the lowest intermediate balance in the account would have been \$6,866.03. In turn, only \$6,866.03 of the \$7,267.12 deposited from the Savings Account into the Money Market Account would have been impressed with the trust. However, since the last deposit came from trust funds, the total balance of \$7,267.12 transferred from the Savings Account upon its closure into the Money Market Account was from Mr. Wieland's lump sum annuity settlement and was thus impressed with the trust.

Notwithstanding Debtor's unexplained and unacceptable non-disclosure of the Money Market

Account on her Schedule B and in response to Question 14 on her Statement of Financial Affairs and of the Savings Account in response to Question 11 on her Statement of Financial Affairs, the court finds that Debtor did not have an equitable interest in any of the \$14,757.12 in the Money Market Account as of the June 6, 2007, filing date of her Chapter 7 petition. As such, the funds are not property of the estate subject to turnover and administration by the Trustee. The Motion will be denied by separate orders entered in accordance with this opinion. The Power of Attorney given by Mr. Wieland to Debtor [Hearing Ex. 1] having expired by its own terms, the Trustee shall return the \$8,059.41 turned over to her by State Bank and Trust Company to Mr. Wieland.