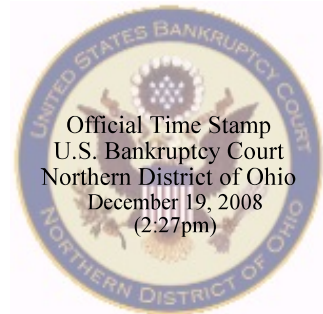


NOT FOR COMMERCIAL PUBLICATION¹

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 08-14832
)
CHRISTINA M. SLOAN,) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**

When the debtor Christina Sloan filed her chapter 7 case, she included a life insurance policy among her assets and claimed that property as exempt from her bankruptcy estate under state law. The trustee objected to the claim of exemption. For the reasons that follow, the trustee's objection is sustained.

I. 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).

II. FACTS²

The debtor filed her chapter 7 bankruptcy case on June 24, 2008 (the petition date). On the petition date, the debtor was the owner and insured of a life insurance policy issued by John Hancock Variable Life Insurance Company with a cash surrender value of \$6,939.95 (the policy). The debtor designated her mother as the beneficiary under the policy. The policy permits the

¹ This written opinion is entered only to decide the issues presented in this case and is not intended for commercial publication in an official reporter, whether print or electronic.

² The parties submitted this matter for decision on stipulated facts. *See* docket 22, 25.

debtor to change the beneficiary until the debtor's death. The debtor's mother died before the petition date, but the debtor had not changed the beneficiary. The debtor is a widow who has not remarried, with no dependents and no will. She has one child, a thirty-eight year old son.

III. THE POSITIONS OF THE PARTIES

The parties disagree over how to apply two Ohio statutes that, broadly speaking, permit the debtor to exempt from her bankruptcy estate a life insurance policy if it is for the benefit of or payable to the debtor's child.³ See OHIO REV. CODE §§ 2329.66(A)(6)(b)⁴ and 3911.10.

The chapter 7 trustee argues that the debtor's son is not the current beneficiary of the policy. As a result, the trustee contends that the *cash surrender value* of the policy is not exempt under Ohio Revised Code § 3911.10, as incorporated into Ohio's exemption statute, § 2329.66(A)(6)(b). That value is, according to the trustee, property of the estate that should be administered for the benefit of creditors.

The debtor argues for a different result based on the fact that her named beneficiary under the policy is dead. The debtor contends that because her named beneficiary is dead and the debtor does not have a will, her probate estate is the current beneficiary. Under the Ohio law governing intestate succession, see Ohio Revised Code § 2105.06(A), when the debtor dies, her son will inherit her property, including the insurance proceeds. Therefore, the debtor posits, the policy *proceeds* are exempt under Ohio Revised Code § 3911.10 because they will be payable by transfer to her son at the debtor's death.

³ Docket 1, 12, 16, 25, 26, 27, 28.

⁴ Ohio Revised Code § 2329.66 was recently amended, but this case was filed before the effective date (September 30, 2008) of the amendments.

IV. DISCUSSION

A. Property of the Bankruptcy Estate/Exemptions

The filing of a bankruptcy case creates a bankruptcy estate which includes “all legal and equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). Under bankruptcy code § 522, the debtor is permitted to exempt, or remove, certain property from the bankruptcy estate. A state may choose to opt-out of the federal exemptions and require a debtor domiciled in that state to use the state exemptions instead. 11 U.S.C. § 522(b). Ohio has opted-out. OHIO REV. CODE § 2329.662. As a result, Ohio residents who wish to exempt property must do so under Ohio Revised Code § 2329.66. *See* 11 U.S.C. § 522(b)(3)(A).

The exemption statutes are to be liberally construed in the debtor’s favor. *In re Shaffer*, 228 B.R. 892, 895 (Bankr. N.D. Ohio 1998). The trustee has the burden of proving by a preponderance of the evidence that an exemption should be disallowed. *See* FED. R. BANKR. P. 4003(c); *Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 723 (B.A.P. 6th Cir. 1999) (citations omitted). Each case must be analyzed on its own facts and circumstances. *Hamo*, 233 B.R. at 723 (citations omitted).

In this case, the policy creates three separate property interests: (1) the right to obtain the cash surrender value of the policy; (2) the right to change the beneficiary of the policy; and (3) the right to receive the proceeds of the policy upon the insured’s death. The first issue is whether any of these interests is property of the estate, because “[n]o property can be exempted (and thereby immunized) . . . unless it first falls *within* the bankruptcy estate.” *Owen v. Owen*, 500 U.S. 305, 308 (1991) (emphasis in original). If the property does fall within the estate, then the question is whether the debtor may exempt any such interest under Ohio law.

1. The Cash Surrender Value

The policy provides that the policy owner has the right to obtain the cash surrender value of the policy.⁵ Several courts have held that the actual cash surrender value of a life insurance policy is property of the bankruptcy estate.

We think it was the purpose of Congress to pass to the trustee that sum which was available to the bankrupt at the time of the bankruptcy as a cash asset[.]

Burlingham v. Crouse, 228 U.S. 459, 473 (1913) (discussing Congressional purpose in enacting the precursor to 11 U.S.C. § 541); *see also U.S. v. Bess*, 357 U.S. 51, 56 (1958); *Caron v.*

Farmington Nat'l Bank (In re Caron), 82 F.3d 7, 10 (1st Cir. 1996); *In re Bunnell*, 322 B.R. 331, 333 (Bankr. N.D. Ohio 2005); *In re Herrell*, 210 B.R. 386, 390 (Bankr. N.D. Fla. 1997); *In re Monahan*, 171 B.R. 710, 717 (Bankr. D.N.H. 1994). This court agrees. The parties stipulated that the debtor owned the policy on the petition date; thus, she had the right to obtain the value of the policy on that date, in cash, for her own benefit. As a result, the cash surrender value is property of the bankruptcy estate.

2. The Right to Change the Beneficiary

The debtor, as policy owner, also had the right to change the beneficiary of the policy.⁶ That right vested in the trustee on the petition date. *In re Butcher*, 72 B.R. 240, 244 (Bankr. E.D.

⁵ Section 13 of the policy states that “[John Hancock Variable Life Insurance Company] will determine and pay the Surrender Value of the policy if the Insured is then alive, subject to Section 23, and the policy will terminate, as of the end of the Valuation Period in which occurs our receipt at our Home Office of (i) written notice, and (ii) the surrendered policy.”

⁶ The relevant portion of § 20 of the policy states that “While the insured is alive, you may change the Owner, Contingent Owner and Beneficiary by written notice.” Section 3 defines “you” and “your” to mean only the owner of the policy.

Tenn. 1987); *Monahan, supra*. Therefore, the right to change the beneficiary is property of the estate.

3. The Right to the Policy Proceeds

The debtor owned the policy on the petition date, but she did not at that time personally have any legal right to the proceeds due on her death. *See Travelers Insur. Co. v. Fields*, 451 F.2d 1292, 1295, n.2 (6th Cir. 1971), *cert. denied*, 406 U.S. 919 (1972) (citing *Stone v. Stephens*, 155 Ohio St. 595 (1951)). She did not, therefore, have an interest in the proceeds that could have become property of the estate.

C. Ohio Revised Code § 3911.10

Ohio law permits a debtor to exempt the person's interest in life insurance contracts as provided by Ohio Revised Code § 3911.10. OHIO REV. CODE § 2929.66(A)(6)(b). Section 3911.10 provides, in relevant part:

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.

OHIO REV. CODE § 3911.10. A life insurance policy is, therefore, free from the claims of the insured's creditors, if it is:

1. taken out for the benefit of the insured's spouse, child or dependent; or

2. made payable to the insured's spouse, child or dependent by change of beneficiary; or
3. made payable to the insured's spouse, child or dependent by transfer; or
4. made payable to the insured's spouse, child or dependent by assignment.

The debtor's interest in the policy is determined as of the petition date. OHIO REV. CODE § 2329.66(D)(1).

1. The policy was not taken out for the benefit of the debtor's son

The "phrase *taken out for the benefit of* as used in O.R.C. § 3911.10 necessarily denotes, with respect to life insurance, the policy beneficiary." *Bunnell*, 322 B.R. at 334 (emphasis in original). The named beneficiary in this case is the debtor's mother, so the policy was taken out for her benefit and not for the benefit of the debtor's son.

2. The policy did not become payable to the debtor's son through a change in beneficiary

The debtor bases her argument on § 20, which states "If the Insured dies and has no surviving Beneficiary, [the owner] will be the Beneficiary, but if [the owner was] the Insured, [the owner's] estate will be Beneficiary. While the Insured is alive, you may change the Owner, Contingent Owner and Beneficiary by written notice."

By its own terms, the section does not operate to define the beneficiary until the insured dies. As a result, the *designated* beneficiary is still the debtor's deceased mother, although it is clear that the debtor's mother will not be an *actual* beneficiary. The debtor's son did not, therefore, become the beneficiary by change in the designated beneficiary.

3. The policy did not become payable to the debtor's son by assignment or transfer

The debtor argues that “[a]ccording to the terms of the life insurance policy, and Ohio Revised Code § 2105.06(A), the proceeds of the life insurance policy *would transfer* to the Debtor’s only son” by intestate succession.⁷ The debtor’s argument is this:

The designated beneficiary prepetition was the debtor’s deceased mother. Because there is no other designated beneficiary, there is no surviving beneficiary. Without a surviving beneficiary, the owner-insured’s probate estate becomes the beneficiary under section 20 of the policy. Therefore, the debtor’s probate estate is now the beneficiary. Because the debtor does not have a will, her son will inherit the policy by intestate succession under Ohio Rev. Code § 2105.06(A) from her probate estate. Therefore, the policy proceeds are payable to the debtor’s son and are exempt.

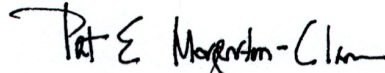
The critical point in time is the petition date. Although the situation described by the debtor might occur in the future, it had not yet occurred when the debtor filed her petition. As a result, the debtor’s future probate estate is not the current beneficiary of the policy, and the proceeds of the policy are not payable by transfer to the debtor’s son.

Moreover, the debtor’s argument confuses the proceeds of the policy with the policy’s cash surrender value. The debtor cannot exempt the proceeds of the policy because they are not currently property of her bankruptcy estate. It is the cash surrender value that is estate property, and that value is tied to ownership—not to the beneficiary. If the debtor should die while the bankruptcy is pending, the proceeds might be payable as the debtor contends, but the trustee would still be entitled to the cash surrender value as an asset of the estate flowing from the estate’s ownership of the policy. *See Burlingham, supra*. As a result, the chapter 7 trustee has the right to liquidate the cash surrender value of the policy for the benefit of the debtor’s creditors.

⁷ Docket 16 at 3 (emphasis added).

V. CONCLUSION

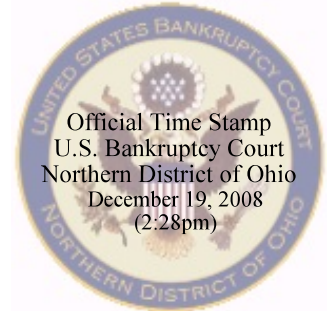
For the reasons stated, the trustee's objection to the debtor's claim of exemption in the John Hancock life insurance policy is sustained and the exemption is disallowed. A separate order will be entered reflecting this decision.

A handwritten signature in black ink, reading "Pat E. Morgenstern-Clarren". The signature is written in a cursive, flowing style.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 08-14832
)
CHRISTINA M. SLOAN,) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **ORDER**

For the reasons stated in the memorandum of opinion issued this same date, the chapter 7 trustee's objection to the debtor's claim of exemption in the John Hancock life insurance policy is sustained, and the exemption is disallowed. (Docket 12).

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Pat E. Morgenstern-Clarren".

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge