

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
)  
DIANE LOFTUS, ) CASE NO. BK97-82311  
) CH. 7  
DEBTOR ) Filing No. 9, 15, 18

MEMORANDUM

Hearing was held on January 5, 1998, on Trustee's Claim of Assets; Objection to Trustee's Claim of Property in the Estate; Request for Hearing filed by Richard Myers, Trustee. Appearances: Richard Myers as Trustee and Dean Jungers as attorney for debtor. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A).

**Facts**

An order for relief under Chapter 7 was entered for Diane Loftus (hereafter "Loftus") on September 16, 1997. The section 341 meeting of creditors was held on October 21, 1997. Thereafter, on October 29, 1997, the Chapter 7 Trustee of the Loftus bankruptcy estate (hereafter "Trustee") filed a "Notice of Trustee's Intent to Claim Certain Assets and Abandon Certain Assets and Request for a Claims Bar Date" (filing no. 9). The Trustee's notice claimed Loftus' interest in her ex-husband's 401(k) plan, awarded to her in a divorce decree, and Loftus' interest in alimony payments to be received post-petition by her from her ex-husband, pursuant to the same divorce decree. Loftus' interest in the 401(k) plan was not originally listed on her schedules.

On November 7, 1997, Loftus filed an Amended Schedule B (filing no. 11) and an Amended Schedule C (filing no. 12). The Amended Schedule B included Loftus' interest in her ex-husband's 401(k) plan and the Amended Schedule C claimed her interest in her ex-husband's 401(k) plan as exempt pursuant to Neb.Rev.Stat. § 25-1563.01.

Thereafter, Loftus filed an "Objection to Trustee's Claim of Property of the Estate" (filing no. 15) on December 15, 1997. The Trustee filed a "Request for Hearing" on December

22, 1997. The Trustee did not file an objection to claim of exemption

### **Analysis**

#### **A. 401(k) Plan**

Section 522(l) provides that the debtor shall file a list of property claimed as exempt, and "[u]nless a party in interest objects, the property claimed as exempt on such list is exempt." Bankruptcy Rule 4003(b) requires the objecting party to file an objection "within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list or supplemental schedules unless, within such period, further time is granted by the court." The United States Supreme Court in Taylor v. Freeland & Kronz, 503 U.S. 638, 112 S.Ct. 1644 (1992), held that an untimely objection to a debtor's claim of exemption, even if the debtor had no colorable statutory basis for claiming the exemption, is barred.

In the present case, Loftus did not originally schedule her interest in her ex-husband's 401(k) plan. The Trustee filed a notice claiming the asset after the section 341 meeting of creditors. Subsequently, Loftus amended her schedules to include her interest in the 401(k) plan and claimed her interest as exempt property.<sup>1</sup> Pursuant to Bankruptcy Rule 4003(b), the Trustee had 30 days from the date of the filing of the amended schedules to object to the claim by Loftus that her interest in the 401(k) plan was exempt. Since the amended schedules were filed on November 7, 1997, the Trustee had until December 7, 1997, to file an objection to claim of exemption or request additional time to object. The Trustee did not object nor request an extension of time to object by December 7, 1997. To date, no objection to the claim of exemptions has been filed by the Trustee. Therefore, under section 522(l) and Taylor v. Freeland & Kronz, Loftus' interest in her ex-husband's 401(k) plan is exempt property.

#### **B. Alimony**

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<sup>1</sup>The Trustee's notice to claim the assets was filed prior to Loftus amending her schedules and claiming her interest in the 401(k) as exempt property.

In the divorce decree, Loftus was awarded alimony in the following amounts: \$600 a month for the first forty-eight months; \$400 a month for the next thirty-six months; and then \$200 a month for a final thirty-six months. (Certified Copy of Decree of Dissolution of Marriage, attached to Loftus' supplemental brief as an exhibit, at p.9, ¶ 29) However, "[s]aid alimony shall terminate upon the death of either party or remarriage of [Loftus]."

The Trustee asserts a claim on post-petition alimony payments to be received by Loftus under the above-referenced divorce decree. The Trustee argues that Loftus had, on the date of filing her petition, a present right to receive the future payments by her ex-husband. On the other hand, Loftus argues that the right to each monthly payment accrues each month, subject to the conditions contained in the divorce decree and that the Trustee has no claim for the post-petition payments.

In support of his argument, the Trustee cites no legal authority from this state or any other and the Court is unpersuaded by his argument. A plain reading of the language of the divorce decree in question indicates that each month Loftus is entitled to the payments only if she is alive, her ex-husband is alive, and she has not remarried. Unless all three conditions are met, the monthly payment is not due. The Court finds that the alimony payments from Loftus' ex-husband accrue each month.

### **Conclusion**

Loftus' interest in her ex-husband's 401(k) is exempt personal property. The Trustee has no claim for post-petition alimony payments, since Loftus' right to the payment accrues each month.

Separate journal entry to be filed.

DATED: July 23, 1998

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:

46 JUNGERS, DEAN

09 MYERS, RICHARD

Copies mailed by the Court to:

United States Trustee

Movant (\*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
DIANE LOFTUS,	)	CASE NO. BK97-82311
	)	A
<u>DEBTOR(S)</u>	)	
	)	CH. 7
	)	Filing No. 9, 15, 18
Plaintiff(s)	)	
vs.	)	<u>JOURNAL ENTRY</u>
	)	
	)	
	)	DATE: July 22, 1998
<u>Defendant(s)</u>	)	HEARING DATE: January 5, 1998

Before a United States Bankruptcy Judge for the District of Nebraska regarding Trustee's Claim of Assets; Objection to Trustee's Claim of Property in the Estate; Request for Hearing filed by Richard Myers, Trustee.

APPEARANCES

Dean Jungers, Attorney for debtor  
Richard Myers, Trustee

IT IS ORDERED:

Loftus' interest in her ex-husband's 401(k) is exempt personal property. The Trustee has no claim for post-petition alimony payments, since Loftus' right to the payment accrues each month. See memorandum entered this date.

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

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