

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
WARREN AND BRENDA J. BIERMAN,) CASE NO. BK96-82856
OCONTO CATTLE CO., a Nebraska) CASE NO. BK96-82857
Limited Partnership,)
)
DEBTOR) A97-8043
_____)
FARM CREDIT SERVICES OF THE)
MIDLANDS, PCA,)
) CH. 11
Plaintiff)
vs.)
)
OCONTO CATTLE CO., a Nebraska)
Limited Partnership; WARREN E.)
BIERMAN and BRENDA J. BIERMAN;)
and BRENDA J. BIERMAN TRUST by)
and through BRENDA J. BIERMAN,)
as TRUSTEE,)
)
Defendant)

MEMORANDUM

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)(E).

Background

On December 16, 1996, an order for relief under Chapter 11 was entered for Warren and Brenda Bierman (BK96-82856) and an order for relief under Chapter 11 was entered for Oconto Cattle Company, a Nebraska limited partnership in which Warren and Brenda Bierman have an interest. The two cases were procedurally consolidated. Farm Credit Services of the Midlands, PCA (hereafter "Farm Credit"), a creditor of both estates, received court permission to prosecute this action on behalf of the estate to seek a determination that the corpus of the Brenda Bierman Trust, of which Brenda Bierman is a beneficiary and was, on petition date, the sole trustee, is

property of Warren and Brenda Bierman's bankruptcy estate. Farm Credit and the Brenda Bierman Trust filed cross motions for summary judgment.

Undisputed Facts

The agreed upon material facts which are undisputed by the Brenda Bierman Trust and Farm Credit are:

1. In 1986, Helen Grant, Brenda Bierman's mother, established the Brenda Bierman Trust (Trust).
2. The Trust was created by and is governed by a written trust agreement.
3. The written trust agreement contains the terms and conditions under which the trust was and is administered.
4. From the inception of the Trust to a date following the filing of this case, Brenda Bierman was a beneficiary of the Trust, and the sole trustee of the Trust.
5. Brenda Bierman resigned as trustee of the Trust on June 24, 1997, approximately six months after the commencement of her bankruptcy case.
6. Tammy Gregerson, one of Brenda Bierman's daughters and a named beneficiary in the written trust agreement, was elected successor trustee of the Trust.

Issue for Decision

Did Brenda Bierman, on the petition date, hold the power to exercise dominion and control over the trust corpus, thereby negating the "spendthrift clause" and causing the corpus to become bankruptcy estate property?

Decision

On the petition date, Brenda Bierman held the power to exercise dominion and control over the trust corpus and, therefore, the trust corpus is property of this estate.

Analysis

A. Standard for Summary Judgment

The United States Supreme Court, in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) addressed the requirements for summary judgment under Federal Rule of Civil Procedure 56. The Court stated that "[u]nder Under Rule 56(c), summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Id. at 322. Federal Rule of Civil Procedure 56 is applicable to bankruptcy adversary proceedings. Fed. R. Bankr. P. 7056.

B. Property of the Estate

The commencement of a bankruptcy case creates an estate that includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The scope of section 541(a)(1) is very broad and includes property of all descriptions, tangible and intangible. Whetzal v. Alderson, 32 F.3d 1302, 1303 (8th Cir. 1994), *citing* United States v. Whiting Pools, Inc., 462 U.S. 198, 205 & n. 9, 103 S.Ct. 2309, 2313 & n. 9, 76 L.Ed.2d 515 (1983); Sosne v. Reinert & Duree, P.C. (In re Just brakes Corporate Systems, Inc.), 108 F.3d 881, 884 (8th Cir. 1997).

Section 541(c)(2) provides an exception the broad language of section 541(a)(1), by excluding the debtor's interest in a trust, if the trust contains a restriction on the transfer of a beneficial interest of the debtor that is enforceable under non-bankruptcy law. Such restriction is generally referred to as a "spendthrift clause." Thus a debtor's interest in a spendthrift trust is excludable from the bankruptcy estate under section 541(c)(2) to the extent the restriction on transfer is enforceable under non-bankruptcy law. Markmueller v. Case (In re Markmueller), 51 F.3d 775, 776 (8th Cir. 1995), *citing* In re Swanson, 873 F.2d 1121, 1122 (8th Cir. 1989).

C. Trusts In Nebraska

C1. Generally

In Nebraska, interpretation of the language of a trust is a matter of law. Smith v. Smith, 246 Neb. 193, 197, 517 N.W.2d 394, 397-98 (1994) (citation omitted). The rules of construction for interpreting a trust are applicable **only** when the language of the trust is not clear. Wahram v. Wahram, 243 Neb. 673, 677, 502 N.W.2d 95, 97 (1993); *citing* Karpf v. Karpf, 240 Neb. 302, 481 N.W.2d 891 (1992), *citing* Conway v. County of Adams, 171 Neb. 677, 107 N.W.2d 418 (1961). If the language of the trust "clearly expresses the settlor's intent, the rules have no application." Id.

In the present case, the language in the written trust agreement is clear and unambiguous. Therefore, only the language of the Trust agreement itself shall be considered for the purpose of these motions.

C2. Spendthrift Provision

Although Nebraska law allows spendthrift trusts, the Nebraska Supreme Court has not explicitly discussed the requirements for a valid spend thrift trust. See e.g. First National of Omaha v. First Cadco Corp., 189 Neb. 734, 205 N.W.2d 734 (1973); In re Nuttleman, 117 B.R. 975, 978 (Bankr. D. Neb. 1990), *aff'd in part and rev'd in part, on other grounds*, 128 B.R. 254 (D. Neb. 1991). If a beneficiary of a spendthrift trust settled the trust, has the power to revoke the trust, or can exercise dominion and control over the trust corpus, the trust is not afforded the protection of a spendthrift trust and the corpus is property of the bankruptcy estate. Nuttleman, 117 B.R. at 978.

Farm Credit argues that the trust agreement, which contains a spendthrift clause, empowered Brenda Bierman, in her capacity as beneficiary and trustee, to exercise excessive dominion and control over the trust corpus. Additionally, Farm Credit argues that the control was sufficiently severe that it was a de jure power to revoke the trust.

At the commencement of the bankruptcy case, Brenda Bierman had two separate relationships vis-a-vis the Trust.

Brenda Bierman was a beneficiary of the Trust and she was the Trustee of the Trust.¹

C2(A). Powers of Brenda Bierman as Beneficiary

Brenda Bierman, as beneficiary, had the significant authority over the Trust and the Trustee. Paragraph 5 of the written trust agreement states, in relevant part:

5. INCOME AND PRINCIPAL DISTRIBUTION DURING LIFE OF BRENDA BIERMAN:

During the life of Brenda Bierman, the TRUSTEE shall pay or apply the net income and principal of the trust estate as **she** may direct from time to time; but until otherwise directed, the TRUSTEE shall pay the net income to Brenda Bierman at least annually.²

Brenda Bierman Trust Agreement at ¶ 5 (emphasis supplied).

The language of paragraph 5 gives Brenda Bierman the ability to compel the Trustee to pay or apply interest and/or principal in any manner Brenda Bierman selects.

¹The election of a successor trustee by the beneficiaries of the Brenda Bierman Trust after the filing of the bankruptcy is irrelevant. Brenda Bierman was Trustee at the commencement of the bankruptcy case and it is at that point that property of the estate is determined.

²An argument can be made that the pronoun "she" refers to the Trustee and that the Trustee has the sole authority regarding disbursements of principal and interest from the Trust. However, reading the pronoun "she" as referring to Brenda Bierman as beneficiary is consistent with the subsequent use of the pronoun "she" in paragraph 5 which clearly references Brenda Bierman, as a beneficiary, not the Trustee. Furthermore, the alternative reading would be awkward (i.e. "the Trustee shall pay or apply the net income and principal of the Trust estate as [the Trustee] may direct from time to time"). Such a reading would, in stilted language, require the Trustee to direct his or her own actions.

The language of paragraph 20 of the written trust agreement allows Brenda Bierman to direct the Trustee to make or refrain from making any investment.

Brenda Bierman is also empowered to control the assets of the Trust by the terms of her will. Paragraph 6 of Appendix C to the written trust agreement states: "[f]ollowing the death of Brenda J. Bierman, the remaining assets (including all undistributed income) shall pass under and in accordance with the terms of the Last Will and Testament of Brenda J. Bierman."

C2(B). Powers of Brenda Bierman as Trustee

Brenda Bierman, as Trustee of the Brenda Bierman Trust, had substantial control over the trust corpus. Paragraph 10 of the written trust agreement contains numerous powers of the trustee, including the unconditional authority to sell or otherwise dispose of the property of the trust on whatever terms the Trustee deemed "advisable". (Trust Agreement at ¶ 10(b)). Additionally, the Trustee is empowered, without prior authorization, to pay the Trustee his or her own compensation and to pay "[a]ll such other sums as are necessary or proper in the TRUSTEE'S discretion to effectuate the purpose of this trust." (Trust Agreement at ¶ 23(c)&(d)).

The Trust argues that paragraph 4 of Appendix C restricts the authority of the Trustee to encroach upon the corpus of the Trust. The paragraph states:

The TRUSTEE is authorized to encroach upon the principal of the trust to provide for the support, care, and comfortable maintenance of Brenda J. Bierman; it being the intent of this trust that she receive sufficient funds to provide the same standard of living as she now maintains, including necessary expense of health care.

Trust Agreement, Appendix C at ¶ 4.

The Trust argues that the language contained in paragraph 4 of Appendix C to the written trust agreement restricted the Trustee's authority to invade the corpus **only** for the support, care and comfort of Brenda Bierman. However, no language in paragraph 4 of Appendix C limits the Trustee regarding

disbursements of the trust corpus. This paragraph explicitly authorizes, but does not limit, the Trustee to utilize the corpus for the support, care and comfort of Brenda Bierman. The lack of limitation in paragraph 4 of Appendix C is in direct contrast to limitations placed upon the Trustee by paragraph 5 of Appendix C, which states:

The TRUSTEE is authorized to encroach upon the principal of this trust **if necessary** to provide for the support, care, education, and maintenance of the children of Warren E. and Brenda J. Bierman; it being the intent that such children receive **only** such distributions of the principal as are reasonably necessary to support, care for, educate, and maintain them. In exercising this right to encroach upon the principal of the trust, the TRUSTEE shall take into consideration any other income received by such children, as well as other resources available to them.

Trust Agreement, Appendix C at ¶ 5 (emphasis supplied).

Paragraph 5 of Appendix C clearly contains limitations on the ability of the Trustee to use the trust corpus for the benefit of the other four named beneficiaries of the Trust (the four daughters of Brenda Bierman). No such limitation is contained in the paragraph 4 of Appendix C.

Case law from other jurisdictions teaches that the mere existence of the power to reach the corpus causes the spendthrift clause to fail, thereby making the Trust assets property of the estate. See In re Gallagher, 101 B.R. 594, 601 (Bankr. W.D. Mo. 1989); In re Herzig, 167 B.R. 707, 711 (Bankr. D. Mass. 1994).

Brenda Bierman, as beneficiary and Trustee, has complete control over the Trust. Brenda Bierman may direct the Trustee to pay over the trust income and the entire corpus at any time. Brenda Bierman controls the investing of the trust assets. Brenda Bierman is able to divest the interest of any or all other beneficiaries by her actions and by her Last Will and Testament.

The Trust contains no discernible limitations on Brenda Bierman's authority and control over the corpus of the Trust. Since Brenda Bierman has complete control and dominion over the trust corpus, the assets of the Trust are not afforded the protection of a spendthrift trust and the entire trust corpus is property of the bankruptcy estate. Nuttleman, supra.

Conclusion

Farm Credit's Motion for Summary Judgment is granted and the Brenda Bierman Trust's Cross Motion for Summary Judgment is denied.

Separate journal entry to be filed.

DATED: April 29, 1998.

BY THE COURT:

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

Copies faxed by the Court to:

SWICK, MARY	344-0588
WOOD, W. ERIC	292-0347
GARDEN, RICHARD JR.	402-474-5393

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.

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) Filing No. 27, 32
OCONTO CATTLE CO., a Nebraska) JOURNAL ENTRY
Limited Partnership; WARREN E.)
BIERMAN and BRENDA J. BIERMAN;) DATE: April 29, 1998
and BRENDA J. BIERMAN TRUST by)
and through BRENDA J. BIERMAN,)
as TRUSTEE,)
)
DEBTOR(S))

Before a United States Bankruptcy Judge for the District of
Nebraska regarding motions for summary judgment.

APPEARANCES

Mary Swick, Attorney for Farm Credit
W. Eric Wood, Attorney for debtors
Richard Garden, Attorney for Brenda J. Bierman Trust

IT IS ORDERED:

Farm Credit's Motion for Summary Judgment is granted and
the Brenda Bierman Trust's Cross Motion for Summary Judgment
is denied. See memorandum entered this date.

BY THE COURT:

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

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