

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: ) CASE NO. BK04-40331  
)  
LYNDON VAN WINKLE and )  
BARBARA VAN WINKLE, ) CH. 7  
)  
Debtor(s). )

MEMORANDUM

Hearing was held in Lincoln, Nebraska on June 23, 2004, before a United States Bankruptcy Judge for the District of Nebraska regarding Filing No. 5, Trustee's Notice of Trustee's Intent to Claim Certain Assets, and Filing No. 19, Objection, filed by the debtors. John C. Hahn appeared for the debtors and Rick D. Lange appeared as Chapter 7 Trustee. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A) and (O).

Debtor Lyndon Van Winkle's mother, Neola F. Van Winkle, executed a Last Will and Testament which included a testamentary trust. Mrs. Van Winkle died prior to the filing of the bankruptcy petition in this case and the real estate referred to in the will and trust provisions became property of the testamentary trust.

The will is in evidence at Filing No. 25. Article IV contains the trust creation language. It provides as follows:

If my spouse does not survive me, then in that event, I give and devise all of my real estate to my Trustee hereinafter named for the benefit of my children. . . .

It is my desire that, if the same may be reasonably done, Lee Wayne Van Winkle and/or Lyndon Lale Van Winkle shall be allowed to rent the farmland from the trust. However, my Trustee's judgment in this matter shall be final and shall consider my sons' farming habits as well as their ability to prudently farm the land for the trust.

It is my further desire that . . . . (this paragraph is not germane to the issue before the court.)

When Lee Wayne Van Winkle and Lyndon Lale Van Winkle discontinue farming the real estate of the trust or when Lyndon Lale Van Winkle reaches the age of 65 years, whichever is sooner, my Trustee shall be authorized to sell all of the remaining real estate of the trust and distribute the proceeds to my children, share and share alike, and the trust shall terminate.

No beneficiary shall have the power to sell, assign, transfer, encumber, or in any manner to anticipate or dispose of any interest created by this Article. The right to principal and income created by this article shall not be liable to be reached in any manner by the creditors of or holders of judgements against any beneficiary. If a

beneficiary should die before his or her share is distributed, the balance of his or her share shall be distributed to his or her issue.

Lyndon Van Winkle filed this Chapter 7 case more than one hundred and eighty days after the death of his mother. The Chapter 7 trustee has claimed his interest in the trust as property of the bankruptcy estate. The debtor has objected to such claim.

It is the position of the bankruptcy trustee that the language in the Last Will and Testament of the decedent does not create a spendthrift trust. As discussed in this court's case of In re Gregory & Brenda Rathe, Case No. BK03-81956, Neb. Bkr. 04:41 (Bankr. D. Neb. Feb. 3, 2004), "a spendthrift trust is one in which the right of the beneficiary to future payments of income or capital cannot be voluntarily transferred by the beneficiary or reached by his or her creditors. 'No particular form of words is necessary to create restrictions rendering the interest of a beneficiary of a testamentary trust inalienable and placing the same beyond the reach of his creditors[.]'" Slip op. at 3 (internal citations omitted).

The language in the Van Winkle will, as quoted above, is very clear. A trust was created upon the death of the decedent. All of her real estate became property of the trust. Her children were eventual beneficiaries of the trust. No beneficiary was given the power to sell, assign, transfer, encumber, or in any manner anticipate or dispose of any interest created by the article which created the testamentary trust. No creditors or holders of judgments could reach any of the assets in the trust.

The language of the trust document clearly and unambiguously evidences the settler's intent to protect the beneficiaries' interest from their creditors, which is sufficient to constitute a spendthrift trust.

The Chapter 7 trustee argues that the debtor has control over the distribution under the trust because the debtor can voluntarily quit farming, which will trigger the testamentary trustee's authority to sell the property and distribute the proceeds pro rata to the beneficiaries. Cessation of farming activity by the debtor would be a voluntary act, and generally a spendthrift trust is one in which the right of the beneficiary to future payments cannot be voluntarily transferred by the beneficiary.

The bankruptcy trustee is correct that a spendthrift provision is invalid when the beneficiary has the equivalence of an ownership interest in the trust property and can therefore demand immediate distribution of the property. See Restatement (Third) of Trusts § 58 (2003). Specifically, the Restatement observes:

An intended spendthrift restraint is . . . invalid with respect to a nonsettlor's interests in trust property over which the beneficiary has the equivalent of ownership, entitling the beneficiary to demand immediate distribution of the property. Thus, if an income beneficiary also holds a presently exercisable general power of appointment (that is, a power currently to compel distribution of trust property to the power holder), a spendthrift restraint will not prevent the beneficiary's creditors or transferees from reaching the property that is subject to the power.

Restatement (Third) of Trusts § 58 cmt. b(1) (2003).

In this case, however, it is not clear from the trust language in Article IV either that the debtor or any other beneficiary has the right to demand immediate distribution of the property, or that the trustee is obligated to distribute the property, when one of the listed contingencies occurs. Rather, the language appears to give the trustee discretion to sell or not sell at that time. A determination of the rights of the beneficiaries and the obligations of the trustee when a listed contingency occurs should be left to a state court.

The Chapter 7 trustee's second argument is that on the date the bankruptcy petition was filed, the debtor, Lyndon Van Winkle, was not farming, and neither was his brother. However, the debtor's declaration at Filing No. 23, including correspondence from the testamentary trustee, supports the position of the debtor that he was farming during both 2003 and 2004 and intends to continue to farm. In this case, the term "farming" means raising livestock on land rented from the trust.

Since it is clear from the language of Article IV of the will, the section that set up the trust, that the decedent intended that Mr. Van Winkle be allowed to rent the farmland from the trust, and it is clear from the affidavit evidence that the debtor is renting farmland from the trust, the contingency which would allow the trustee to sell the real estate has not occurred. The trust has not been, and cannot be, terminated while the debtor is farming.

The trust is a spendthrift trust and the debtor is farming. Therefore, the debtor's interest in the trust assets is not property of the bankruptcy estate. A separate order will be entered denying the bankruptcy trustee's notice of intent to claim assets.

DATED: June 25, 2004

BY THE COURT:

/s/ Timothy J. Mahoney  
Chief Judge

Notice given by the Court to:  
John C. Hahn  
\*Rick D. Lange  
U.S. Trustee

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

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ORDER

Hearing was held in Lincoln, Nebraska on June 23, 2004, before a United States Bankruptcy Judge for the District of Nebraska regarding Filing No. 5, Trustee's Notice of Trustee's Intent to Claim Certain Assets, and Filing No. 19, Objection, filed by the debtors. John C. Hahn appeared for the debtors and Rick D. Lange appeared as Chapter 7 Trustee.

IT IS ORDERED: For the reasons stated in the Memorandum filed contemporaneously herewith, the bankruptcy trustee's notice of intent to claim assets (Fil. #5) is denied. The trust is a spendthrift trust and the debtor is farming. Therefore, the debtor's interest in the trust assets is not property of the bankruptcy estate.

DATED: June 25, 2004

BY THE COURT:

/s/ Timothy J. Mahoney  
Chief Judge

Notice given by the Court to:  
John C. Hahn  
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