

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
)  
TARRA DAWN BAIRN, ) CASE NO. BK04-40256  
)  
Debtor(s). ) CH. 7

MEMORANDUM

This matter is before the court on the Chapter 7 trustee's objection to exemptions (Fil. #11) and resistance by the debtor (Fil. #13). Andrew Snyder represents the debtor, and Philip Kelly is the Chapter 7 Trustee. The motion was taken under advisement as submitted on stipulated facts and briefs without oral arguments. 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)(B).

The trustee's objection is granted. The disputed refunds are property of the bankruptcy estate.

The debtor received, post-petition, a total of \$4,711 in state and federal income tax refunds for the 2003 tax year. The debtor seeks to exempt \$2,931 of the refunds under a newly enacted state law exempting "the full amount of any federal or state earned income tax credit refund" in bankruptcy. That statute, Neb. Rev. Stat. § 25-1553, became operative on April 16, 2004. The debtor raises the issue because the statute became effective after she filed her Chapter 7 petition and before she filed her 2003 tax returns and received her refunds. She asserts that because the statute was in effect at the time the refund came into her hands, the earned income credit portion of her refund is exempt.

The debtor's argument raises some interesting points, but it is contrary to the settled caselaw regarding property of the bankruptcy estate and legislative intent.

The majority of courts have determined that tax refunds are indeed property of the estate because they plainly fall under the 11 U.S.C. § 541(a)(1) definition of "all legal or equitable interests of the debtor in property as of the commencement of the case." See, e.g., Wallerstedt v. Sosne (In re Wallerstedt),

930 F.2d 630 (8th Cir. 1991); Barowsky v. Serelson (In re Barowsky), 946 F.2d 1516 (10th Cir. 1991); Doan v. Hudgins (In re Doan), 672 F.2d 831 (11th Cir. 1982); Kleinfeldt v. Russell (In re Kleinfeldt), 287 B.R. 291 (B.A.P. 10th Cir. 2002); In re WDH Howell, LLC, 294 B.R. 613 (Bankr. D.N.J. 2003); In re Webb, 234 B.R. 96 (Bankr. W.D. Mo. 1999); Riske v. Oliver (In re Oliver), 172 B.R. 924 (Bankr. E.D. Mo. 1994). Property of the estate includes contingent interests in future payments. Potter v. Drewes (In re Potter), 228 B.R. 422 (B.A.P. 8th Cir. 1999); In re Yonikus, 996 F.2d 866 (7th Cir. 1993); Barfknecht v. Hennepin County Dept. of Welfare (In re Barfknecht), 15 B.R. 463 (Bankr. D. Minn. 1981).

Earned income credits are analogous to tax refunds and are also considered property of the bankruptcy estate. Baer v. Montgomery (In re Montgomery), 219 B.R. 913 (B.A.P. 10th Cir. 1998), aff'd, 224 F.3d 1193 (10th Cir. 2000); Trudeau v. Royal (In re Trudeau), 237 B.R. 803 (B.A.P. 10th Cir. 1999); In re Demars, 279 B.R. 548 (Bankr. W.D. Mo. 2002); In re Goertz, 202 B.R. 614 (Bankr. W.D. Mo. 1996); In re Davis, 136 B.R. 203 (Bankr. S.D. Iowa 1991).

Neither party to the present case disputes that the tax refund is an asset of the bankruptcy estate. The issue is the timing of the refund in light of the new exemption statute.

A debtor's entitlement to an exemption is determined on the day the bankruptcy petition is filed. Armstrong v. Peterson (In re Peterson), 897 F.2d 935 (8th Cir. 1990); Mueller v. Buckley (In re Mueller), 215 B.R. 1018, 1022 (B.A.P. 8th Cir. 1998); In re Maloney, 311 B.R. 525 (Bankr. W.D. Mo. 2004); In re Hughes, 244 B.R. 805, 812 (Bankr. D.S.D. 1999).

Newly enacted statutes typically apply prospectively only. In noncriminal cases, substantive statutes are generally not given retroactive effect unless the legislature has clearly expressed an intention that the new statute be applied retroactively. Soukop v. ConAgra, Inc., 264 Neb. 1015, 1017-18, 653 N.W.2d 655, 657 (2002); Ottaco Acceptance, Inc. v. Huntzinger, 268 Neb. 258, 263, 682 N.W.2d 232, 237 (2004).

In this case, the operative date of § 25-1553 was April 16, 2004, upon its approval by the governor. Nothing in the language

of the statute<sup>1</sup> indicates the Unicameral's desire to have the new law be effective retroactively. Thus, it cannot apply to the debtor's exemptions as they existed on the petition date of January 26, 2004.

Separate order will be entered granting the trustee's objection to exemptions.

DATED: August 16, 2004

BY THE COURT:

/s/ Timothy J. Mahoney  
Chief Judge

Notice given by the Court to:

Andrew Snyder  
\*Philip Kelly  
United States 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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<sup>1</sup>The text of the statute as posted on the Nebraska Unicameral's website (<http://www.unicam.state.ne.us/>) is:

**25-1553  
Federal or state earned income tax credit refund; when exempt.**

In bankruptcy and in the collection of a money judgment, the full amount of any federal or state earned income tax credit refund shall be exempt from attachment, garnishment, or other legal or equitable process and from all claims of creditors.

**Source:**

Laws 2004, LB 1207, § 6.  
Operative date April 16, 2004.

Available at <http://statutes.unicam.state.ne.us/Corpus/statutes/chap25/R2515053.html> (last visited August 16, 2004).

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ORDER

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IT IS ORDERED: The Chapter 7 trustee's objection to exemptions (Fil. #11) is granted. The debtor's income tax refunds are not exempt under Neb. Rev. Stat. § 25-1553. The debtor shall turn over to the trustee all non-exempt portions of her federal and state income tax refunds.

DATED: August 16, 2004

BY THE COURT:

/s/ Timothy J. Mahoney  
Chief Judge

Notice given by the Court to:  
Andrew Snyder  
\*Philip Kelly  
United States Trustee

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